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No. 71

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

ROY O. WEST, Secretary of the Interior,
Petitioner,

—VS.—

STANDARD OIL COMPANY, a corporation,
Respondent.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

W. CARR MORROW,
Attorney and Special Counsel for Petitioner.
Address: Republic Building, Seattle, Washington

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CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

This case arises on a writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia affirming with costs the judgment of the Supreme Court of the District of Columbia.

The opinion of the Supreme Court of the District of Columbia is set forth in the record, page 95, and that of the Court of Appeals of the District of Columbia on page 119. (23 Fed. (2d) 750)

The decree of the Supreme Court of the District of Columbia was entered September 7, 1926 (R. 113), and the decree of the Court of Appeals for the District of Columbia was entered on December 5, 1927 (R. 125).

JURISDICTION

Respondent sought and has been granted by the Supreme Court of the District of Columbia, affirmed by the Court of Appeals of the District of Columbia, an injunction against the petitioner restraining him from proceeding, in the discharge of his official duties as Secretary of the Interior, to determine the mineral or non-mineral character of Section 36, Township 30 South, Range 23 East, Mount Diablo B. & M., located in the so-called Elk Hills, Kern County, State of California. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

The case involves considerations of great importance to the government and people of the United States. The Court of Appeals of the District of Columbia, due probably to a misreading of the record before it, has enjoined the head of one of the administrative branches of the federal government from proceeding with the performance of duties assigned to him by the laws of the land and the joint resolution of the Congress. This judgment does violence to long established principles in the administration of the public lands and repeatedly recognized by the decisions of this court.

STATEMENT OF THE CASE

This case involves the question of whether the Secretary of the Interior shall be permitted, in the discharge of his official duties, to determine whether this so-called school section in the State of California was or was not known mineral in character as of January 26, 1903, the date when the survey of said section was accepted by the General Land Office.

The original petitioner herein was Hubert Work, Secretary of the Interior, who has been succeeded by Roy O. West, substituted as petitioner herein. It will be understood that in the use of the term "petitioner" we are referring to Hubert Work as Secretary of the Interior up to the date of his resignation, at the close of business, July 24, 1928, and since said date to Roy O. West in similar official capacity.

Petitioner had been directed by joint resolution of the Congress of the United States in February, 1924, to institute proceedings to assert and establish title of the Government to the Section in question. Petitioner accordingly had directed the Register and Receiver at Visalia, California, to hold a hearing on the charge that the land was mineral in character and so known on January 26, 1903 (R. 21). Notice of said charges was served upon the respondent as required by law and hearings were about to be instituted when in October, 1925, respondent filed its complaint in the Supreme Court of the District of Columbia,

asking for a permanent injunction restraining petitioner from proceeding further with the charges against said land.

After reciting certain facts with regard to the history of this section, which will be referred to later, the bill set up three different grounds for relief charging that the non-mineral character of this land had been determined on three different occasions. Paragraph IV alleges that the non-mineral character of the land was determined by an order relieving the same from suspension in 1904 (R. 3). Paragraph V charges that the regulations of the Department of the Interior in force in 1903 fixed the non-mineral character of the land as a rule of property and vested title in the State of California (R. 4). Paragraph X alleges that Secretary Fall adjudicated this question in June, 1921 (R. 7).

An answer was filed in behalf of petitioner denying that the Department of the Interior had ever adjudicated the known mineral character of this section (R. 27). It alleged that the lands involved were public lands of the United States; that they had been returned by the surveyors as mineral in character; that these lands had always been treated as public lands of the United States; that the exclusive jurisdiction to determine the mineral character or non-mineral character of public lands reposed in the Department of the Interior and no such adjudication as to Section 36 had ever been made by the Department; and that petitioner as Secretary of the Interior Department was proceeding in the exercise of that jurisdiction and pursuant to direction of Congress by its joint

resolution above mentioned to make such determination. The answer denied that the court had any jurisdiction over the case because the petitioner had no personal or individual interest in the matters or issues involved, and charged that the suit was in effect one against the United States; that the complaint sought to adjudicate the plaintiff's title to the lands, and since the United States had not consented to be sued, and was not a party, the relief prayed for would be an illegal interference with the executive and legislative branches of the Government (R. 27-35).

Chief Justice McCoy of the Supreme Court of the District of Columbia, after hearing, denied on December 18, 1925, complainant's motion for a preliminary injunction (R. 65). The hearing on the merits came before Acting Associate Justice Smith of the Supreme Court of the District, who found for the respondent and enjoined the petitioner from proceeding with the hearing upon the charges filed against said section (R. 113). On appeal, the action of the trial court was affirmed by the Court of Appeals of the District of Columbia (R. 125). (23 Fed. (2d) 750)

The following facts with respect to the history of this Section 36 are established by the record in the case and are pertinent to the issues.

This suit involves the title to Section 36, Township 30 South, Range 23 East, Mount Diablo B. & M., located in the so-called Elk Hills in Kern County, State of California.

By the Act of March 3rd, 1853, Congress granted to the State of California Sections 16 and 36 for public school purposes and provided that none other than

township lines should be surveyed when the lands are mineral or are deemed unfit for cultivation (10 Stat. L. 244, Chap. CXLV). About half of the said township was surveyed in 1856, but the balance of the township including the section in question, Section 36, was not surveyed until 1901. This survey was accepted by the Commissioner of the General Land Office on January 26, 1903. This date is of prime importance in determining the issues of this case. If the section in question was on this date known mineral lands, the title did not pass to the state under the school land grant. The Department of the Interior has the exclusive jurisdiction to determine whether the lands at this date were or were not known mineral in character. It is the contention of the government that the mineral character of this section has never been adjudicated by the department.

The plat and general description attached to the field notes of this official survey returned this section 36 as mineral in character. This mineral return was at all times thereafter on file in the office of the United States Surveyor General in California and in the Office of the Secretary of the Interior at Washington, D. C., and was part of the official public records (R. 66).

Prior to the survey in question, to-wit, on July 19, 1900, the Commissioner of the General Land Office, having previously telegraphed the Register and Receiver at Visalia, California, to suspend from disposition until further orders some forty-six townships, including the township wherein Sec. 36 here involved

was located, issued his official order to the Register and Receiver as follows:

"Sirs:

Suspensions from disposition of certain townships by telegrams of February twenty-sixth and twenty-eighth, last, will be continued for a reasonable time pending inquiry as to the true character of the lands which is now in progress.

These suspensions do not include mineral lands.

Very respectfully,

Binger Hermann, Commissioner."

(R. 11).

On March 7, 1903, the State of California offered Sec. 36 as a base for indemnity school-land selection on the ground of its mineral character. This application remained on file in the General Land Office until November 20th, 1905, when the State of California filed application to amend the same by the substitution of other lands as base (R. 50).

On April 5th, 1904, the Acting Commissioner of the General Land Office by letter addressed to the Register and Receiver at Visalia relieved from the suspension from disposition about fourteen of the forty-six townships above referred to, including the entire township in which this section 36 was located. This action was based upon the report of a special agent covering the lands suspended by the order of July 19, 1900. The order recites:

"I am now in receipt of the agent's report to the effect that certain of the lands so suspended are being developed for their deposits of mineral and that numerous oil wells have been sunk

which have proved to be good producers of mineral. Other townships and portions of townships have not been developed at all, for wells that have been sunk have proved to be barren. The lands upon which he states active mineral development is in progress will be allowed to continue suspended, but as to the following tracts where no mineral has been discovered it is believed that no good reason exists for further suspension.

"Accordingly the lands hereinafter described are hereby relieved from suspension." (R. 16, Ex. F)

On September 8th, 1908, this section in question, together with other lands in the McKittrick-Sunset Oil District, were temporarily withdrawn from agricultural entry pending their examination and classification by the United States Geological Survey (R. 91, Ex. 12). On June 4th, 1909, the Director of the United States Geological Survey classified this section, together with other lands, as oil lands (R. 92, Ex. 13), and on June 7th, 1909, the classification was approved by the Secretary of the Interior and the temporary withdrawal continued pending consideration of legislation on the question. On September 27th, 1909, this section, with other land, was included in Temporary Withdrawal No. 5 in the following language:

"In aid of proposed legislation affecting the use and disposition of the petroleum deposits on the public domain, all public lands in the accompanying lists are hereby temporarily withdrawn

from all forms of location, settlement, selection, filing, entry, or disposal under the mineral or non-mineral public-land laws. All locations or claims existing and valid on this date may proceed to entry in the usual manner after field investigation and examination." (R. 93, Ex. 15)

On July 1st, 1910, the Director of the United States Geological Survey recommended that the aforesaid temporary petroleum withdrawal be ratified and confirmed and the lands withdrawn from settlement, location, sale, or entry and reserved for classification and in aid of legislation affecting the use and disposal of petroleum lands belonging to the United States. This recommendation was approved on July 1st, 1910, by the Secretary of the Interior and on the day following by President Taft (R. 94, Ex. 16).

By executive order dated September 2, 1912, this section, together with other lands, was permanently withdrawn and included in Naval Petroleum Reserve No. 1, and the order of July 2nd, 1910, was continued and extended in so far as it affected this section and other lands (R. 95, Ex. 17).

It is necessary to note that on January 3rd, 1901, before the section in question was surveyed, and prior to the time when the State of California could have claimed any title whatsoever to this land, it issued a contract of sale covering the same to one, Alice J. Miller. Apparently the state immediately undertook to tax this land as though it had title to the same and the said Alice J. Miller having failed to pay her taxes, the State purported on the 2nd day of July, 1902, to sell to itself the said lands for delinquent taxes, pen-

alties, costs and charges and undertook to deed the same to itself on July 2nd, 1907. On August 25th, 1908, one George Hay, and one M. W. Buffington, purported to redeem said Section 36 from the sale for taxes assessed against Alice J. Miller and applied to the state to purchase the same (Paragraph VIII of Complaint, R. 5).

The applications to purchase presented by Hay and Buffington (R. 18, Ex. I and J), provided as follows:

> "All applications, under whatsoever act, filed in the office of the surveyor general *must be retained ninety days before approval*, and must be approved (when there is no conflict) by the surveyor general at the expiration of six months, subject, however, to the provisions of section thirty-four hundred and six and thirty-four hundred and seven of this code, and all unapproved applications which have been on file over six months wherein the approval has not been demanded, or wherein the contest has not been referred to court, or a demand made for an order of reference, as provided in section thirty-four hundred and fourteen of the Political Code, shall be null and void."

On November 29, 1909, Oscar Sutro, as agent for the respondent, purchased from the said Hay for $11,000 his portion of said section, and on January 31st, 1910, secured a patent from the State of California therefor. The patent to Buffington from the State of California was issued under date of January 20th, 1910, for the balance of the said section.

Respondent did nothing towards developing said

land for oil purposes until August, 1918, when it commenced the drilling of a well thereon and discovered oil in said well on January 5th, 1919. A few months later respondent acquired under a development contract, the right to develop the balance of said section covered by the alleged patent from the state to Buffington.

On January 14th, 1914, the Register at Visalia, California, was directed to begin proceedings in the Land Office charging that the land was mineral in character containing valuable deposits of petroleum and was known to be mineral in character at and prior to the date of the survey, December 20th, 1901. No further action thereon was taken until March 2nd, 1921, when the Commissioner of the General Land Office ordered a renewal of the proceedings and an amendment of the charges.

This order was addressed to the Register and Receiver at Visalia, California, and instructed him as follows:

> "You are therefore directed to proceed in accordance with Circular of February 26, 1916 (44 L. D. 572) and in the notice provided for in paragraphs 3, 4, and 5 thereof; you will state that representatives of this office charge:
>
> "(1) That the land is mineral in character, containing valuable deposits of petroleum.
>
> "(2) That the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey of this office, January 26th, 1903." (R. 75-6, Ex. 1 and 2)

The circular of Feb. 26, 1916 (44 L. D. 572) in

accordance with which the Register was directed to proceed in prosecuting the charges against this section 36, prescribed the established and orderly method adopted by the Department of the Interior for the determination of the character of the land in question and provided for a hearing after due notice, at which both the government and the claimants would be given opportunity to present testimony under oath and to cross examine opposing witnesses. For the convenience of the court, we set forth a copy of said Circular herewith:

"CIRCULAR No. 460.

"MANNER OF PROCEEDING IN CONTESTS INITIATED UPON A REPORT BY A REPRESENTATIVE OF THE GENERAL LAND OFFICE.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., February 26, 1916.

TO SPECIAL AGENTS AND REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES:

The following rules are prescribed for proceedings in contests initiated upon a report by a representative of the General Land Office. All existing instructions in conflict herewith are superseded:

1. The purpose hereof is to secure speedy action upon claims to the public lands, and to allow claimant, entryman, or other claimant of record, opportunity to file a denial of the charges against the entry or claim, and to be heard thereon if he so desires.

2. Upon receipt of a report this office will consider the same and determine therefrom whether the facts stated, if true, would warrant the rejection or cancellation of the entry or claim.

3. Should the charges, if not disputed, justify the rejection or cancellation of the entry or claim the local officers will be duly notified thereof and directed to issue notice of such charges in the manner and form hereinafter provided for, which notice must be served upon the entrymen and other parties in interest shown to be entitled to notice.

4. The notice must be written or printed and must refer to the letter from this office by initial and date, as authority for issuing the notice, and must state fully the charges as contained in said letter; also the number of the entry or claim, subdivision of land involved, name of entryman or claimant or other known parties in interest.

5. The notice must also state that the charges will be accepted as true (*a*) unless the entryman or claimant files in the local office within 30 days from receipt of notice a written denial under oath, of said charges, with an application for a hearing, (*b*) or submits a statement of facts rendering the charges immaterial, (*c*) or if he fails to appear at any hearing that may be ordered in the case.

6. Notice of the charges may in all cases be served personally upon the proper party by any officer or person or by registered letter mailed to the last address of the party to be notified, as

shown by the record, and to the post office nearest to the land. When it is necessary to serve notice on the unknown heirs of a person in interest, the same must be addressed to that person at his address of record and also at the post office nearest the land. Proof of personal service shall be the written acknowledgment of the person served or the affidavit of the person who served the notice, attached thereto, stating the time, place, and manner of service. Proof of service of notice by registered letter shall consist of the report of the register and receiver who mailed the notices, accompanied by the post-office registry return receipts, or the returned unclaimed registered letters.

7. If a hearing is asked for, the local officers will consider same and confer with the Chief of Field Division relative thereto and fix a date for the hearing, due notice of which must be given entryman or claimant. The above notice may be served by registered mail. By ordinary mail, a like notice will be sent to the Chief of Field Division.

8. The Chief of Field Division will duly submit, upon the form provided therefor, to this office, an estimate of the probable expense required on behalf of the Government. He will also cause to be served subpoenas upon the Government witnesses and take such other steps as are necessary to prepare the case for prosecution.

9. The Government must appear with its witnesses on the date and at the place fixed for said

hearing, unless there is reason to believe that no appearance on behalf of the Government will be required. The officer in charge of hearings must, therefore, keep advised, as far as possible, as to whether the defendant intends to appear at the hearing. The Chief of Field Division may, when present, conduct the hearing on behalf of the Government.

10. If the entryman or claimant fails to deny the charges under oath and apply for a hearing, or to submit a statement of facts rendering the charges immaterial, or fails to appear at the hearing ordered without showing good cause therefor, such failure will be taken as an admission of the truth of the charges and will obviate the necessity for the Government submitting evidence in support thereof, and the register and receiver will forthwith forward the case with recommendation thereon to the General Land Office and notify the parties by registered mail of the action taken. In cases finally closed upon default of claimant, if application to reopen any case is filed with the register and receiver, they will forthwith forward same with recommendations to the General Land Office.

11. Upon the day set for the hearing and the day to which it may be continued the testimony of the witnesses for either party may be submitted, and both parties, if present, may examine and cross-examine the witnesses, under the rules, the Government to assume the burden of proving the charges, unless otherwise ordered.

12. If a hearing is had, as provided in paragraph 11, the local officers will render their decision upon the record, giving due notice thereof in the usual manner. When decision is adverse to the Government, notice thereof must be sent to the Chief of Field Division.

13. Appeals or briefs, if filed, must be in accordance with the rules, but need not be served upon the Chief of Field Division or Government representative in charge of the hearing.

14. The above proceedings will be governed by the rules of practice. All notices served on claimants or entrymen must likewise be served upon transferees or mortgagees.

Very respectfully,

CLAY TALLMAN,
Commissioner.

Approved:

ANDRIEUS A. JONES,
First Assistant Secretary."

The case was pending on the charge above set out and the procedure prescribed in the foregoing circular was immediately set in motion. Incidentally, in the latter part of March, 1921, the Department of Justice was called upon by the Secretary of the Navy and the Commissioner of the General Land Office to investigate the question as to whether the government should take action through the courts to protect the interests of the government until this contest had been finally determined. After various conferences between representatives of the Department of Justice and the Navy Department it was decided that the

Department of Justice was without jurisdiction to determine the title to said Section 36, that the determination of the said title was exclusively within the jurisdiction of the Department of the Interior, and that the powers of the Department of Justice were limited to protect, by injunction or a receivership, the mineral content of the land until the question of the mineral or non-mineral character of the land at the date of the approval of the survey was determined by the Department of the Interior (R. 68).

Mr. Sutro, attorney for the respondent, was in Washington at this time and in conference with various representatives of the Department of Justice and the Interior Department. It was agreed between the representatives of the government and the representatives of the transferees from the State of California that no action would be taken by the Department of Justice for the appointment of a receiver, or for an injunction against the operation of said lands, provided there should be no further development of the lands by the transferees in possession. This agreement was reached upon the understanding that the transferees from the state would endeavor to secure from the Department of the Interior an early hearing and determination with respect to the known mineral character of said Section 36 at the date of the approval of the survey thereof (R. 69).

Mr. Sutro discussed with the Secretary of the Interior and the First Assistant Secretary the question of the title to this section and on May 26th, 1921, filed

a brief setting forth his views on the subject. The opening paragraph of this brief recites:

> "This is the argument in support of the request that the Secretary of the Interior decide that in view of the previous action of the Department and of its regulations in force in January, 1903, the title to said Section (36) is vested in the State of California or its grantees." (R. 79)

As we shall show more fully hereafter, Mr. Sutro was not asking the Secretary of the Interior to find as a matter of fact that the land was not known mineral on January 26th, 1923, but to dismiss the pending inquiry into this question on the ground that the non-mineral character of the land had been previously determined by the Department.

The Secretary of the Interior on May 28th, sent to the Secretary of the Navy and to the Attorney General, a notice stating that the Standard Oil Company and the Pan American Oil Company had asked to be heard orally in the matter of the proposed proceedings by the government to determine whether or not Section 36 passed to the State of California under the School Grant; that he, Secretary Fall, had agreed to hear them on June 8th, 1921, and would be glad to have representatives of the Department named, present at that time if they so desired (R. 89-90).

In accordance with notice, the hearing was held before Secretary Fall on June 8th, 1921. First Assistant Secretary Finney was present, also C. D. Hammel appearing for the United States Land Office, D. D. Caldwell, Special Assistant Attorney General,

Commander H. A. Stuart and Harry L. Underwood, Special Assistant to the Attorney General. Representatives of the various transferees from the State of California were also present. A record of what transpired at this hearing is set forth in full, beginning on page 37 of the record, and will be discussed in detail later.

It is sufficient to say that the hearing consisted of an argument by Mr. Sutro, attorney for the transferees from the state, wherein he set forth that the character of this land had already been adjudicated by the Department of the Interior, and called for a dismissal of the proceedings ordered on the charges then pending. At the conclusion of the argument, after a number of questions were asked by Secretary Fall of Assistant Secretary Finney and others present, Secretary Fall announced "the contest will be dismissed." Notices were thereafter sent to the Commissioner of the General Land Office and by him to the Register and Receiver at Visalia, California, dismissing the proceedings in question and closing the case on the records (R. 20-21). No testimony was presented in behalf of the government nor was any argument made in behalf of the government's claim to this land.

Thereafter on February 21, 1924, the Congress of the United States, by joint resolution, directed the Secretary of the Interior to institute proceedings to assert and establish title of the government to this section, and directed the president to employ counsel to prosecute such proceedings and any suits ancillary thereto. In accordance with this joint resolution the

Secretary of the Interior on May 8th, 1925, issued his formal order reversing, vacating, and setting aside the order of Secretary Fall of June 8th, 1921, and directing the Register and Receiver at Visalia, California, to hold a hearing on the charge that the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey by the General Land Office, January 26th, 1903 (R. 21). The Register served notice of said charges upon the parties claiming title or interest in said section and called on them to appear and answer said charges and to apply for a hearing thereon (R. 24). On August 4th, 1925, the respondent filed with the Secretary of the Interior a plea in bar to the jurisdiction of the Secretary to order said hearing on the ground that the Department was without jurisdiction to consider the case at this time. This plea in bar was denied by the Secretary of the Interior on August 17th, 1925, who directed that the hearing ordered on May 8th, 1925, should proceed.

Thereupon on October 9th, 1925, the respondent filed its bill in the Supreme Court of the District of Columbia against the petitioner, the Secretary of the Interior, for a permanent injunction restraining the petitioner from continuing the proceedings directed by the order aforesaid. A motion was filed at the same time requiring the petitioner to show cause why an injunction *pendente lite* should not issue.

Petitioner answered thereafter and the show cause order was argued before Chief Justice McCoy of the Supreme Court, who filed his opinion November 23, 1925, denying the motion for the injunction *pendente*

lite. This opinion reviewed at length the history of this section 36 and the claims of the respondent thereto (R. 50-59).

The case thereafter came to a hearing on the merits before Acting Associate Justice James F. Smith, who filed his opinion on July 28th, 1926, in favor of the respondent and enjoined the petitioner from proceeding with the hearing in question (R. 95-113).

This appeal is prosecuted from the decree in favor of the respondent entered in accordance with the aforesaid opinion.

ASSIGNMENTS OF ERROR

The assignments of error upon which the petitioner relied in the Court of Appeals of this District of Columbia were as folows (R. 115-117):

> "I. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph I of the final decree herein, reading as follows:
>
> 'The Secretary of the Interior had supervisory power to hold the hearing of June 8, 1921, and had jurisdiction to determine the character of section 36 as known on January 26, 1903, without a previous trial in the United States land office at Visalia, California, or appeals from decisions made by officers of the local land office at Visalia, California, and the Commissioner of the General Land Office.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

II. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph II of the final decree herein, reading as folows:

'That the Secretary of the Interior granted a hearing for the purpose of determining the issues raised by the adverse proceedings and gave notice to all the parties in interest of such hearing.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

III. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph III of the final decree herein, reading as follows:

'At the hearing on June 8, 1921, the Secretary of the Interior had before him evidence which he had a right to consider and which supported his dismissal of the adverse proceedings referred to.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

IV. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph IV of the final decree herein, reading as follows:

'The order of dismissal which was reduced to writing at his direction was a judicial determination of the non-mineral character of the land as known on January 26, 1903.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

V. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph V of the final decree herein, reading as follows:

'The order of dismissal reduced to writing as aforesaid was a judgment on the merits and its correctness can not be questioned in collateral proceedings except for fraud.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

VI. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph VI of the final decree herein, reading as follows:

'The present Secretary of the Interior, the defendant herein, is without jurisdiction to proceed with adverse proceedings to determine the character of said land, and has no jurisdiction over said land.'

That said conclusion is contrary to the evidence in the case and the law applicable thereto.

VII. That the Supreme Court of the District of Columbia erred in making the conclusion of fact set forth in Paragraph VII of the final decree herein, reading as follows:

'The order of the defendant dated May 8, 1925, purporting to reverse, vacate, and set aside the action of the former Secretary of the Interior in dismissing the adverse proceedings instituted against said land by letter dated January 14,

1914, as amended, and directing a hearing on the charges specified in said order, is without jurisdiction and said hearing would constitute a cloud upon plaintiff's title to the portions of said section 36 described in the complaint and will, unless restrained, cause plaintiff damage, for which plaintiff has no adequate remedy at law.'

That said conclusion is contrary to the evidence in the case and law applicable thereto.

VIII. That the Supreme Court of the District of Columbia was in error in enjoining this defendant, as Secretary of the Interior, from further prosecuting the adverse proceedings heretofore and on May 8th, 1925, directed by him with regard to the title to the west half and the west half of the east half and lots five (5), six (6), seven (7), eight (8), eleven (11), and twelve (12) of section thirty-six (36), township thirty (30) south, range twenty-three east, Mount Diablo base and meridian, Kern County, California, and from ordering any hearing or directing any hearing to proceed in or before the United States Land Office at Visalia, California, or in or before the General Land Office or before himself as Secretary of the Interior, regarding the issues raised in said adverse proceedings, for the reason that said injunction is contrary to the law applicable to this case and is an illegal interference with and a restraint upon the executive and legislative branches of the Government."

Since the Court of Appeals of the District of Columbia affirmed the judgment of the Supreme Court

of the District, the foregoing assignments of error are the basis of this appeal. They may be summarized by the statement that the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District and in holding that the action of Secretary Fall on June 8th, 1921, in dismissing the contest then pending against this section in the Interior Department was an adjudication of the known non-mineral character of the land as of January 26th, 1903.

ARGUMENT

I.

UNTIL TITLE HAS PASSED FROM THE U. S. THE PUBLIC LANDS ARE EXCLUSIVELY WITHIN THE JURISDICTION OF THE DEPARTMENT OF THE INTERIOR

It is admitted by both parties that the Department of the Interior has jurisdiction over all public land questions and that the Secretary of the Interior has the final and exclusive decision as to the character of public lands.

Catholic Bishop of Nisqually v. Gibbon, 158 U. S. 155;

Burke v. Southern Pac. R. R. Co., 234 U. S. 669;

U. S. v. Schurz, 102 U. S. 378.

The State of California and its transferees are entitled to claim Section 36 as school lands under the Grant of 1853 only in the event that said lands were

not known mineral on January 26, 1903, the date of the approval of the survey.

Mining Co. v. Consolidated Mining Co., 102 U. S. 167;

Mullan v. U. S., 118 U. S. 271.

The determination of the mineral or non-mineral character of said Section in 1903 can be made only by the Department of the Interior, and until such decision has been finally made, this Department, representing the Federal Government, has not parted with jurisdiction over the lands as part of the public domain. Until the matter is closed by final action, the proceedings of an officer of the Department are as much open to review or reversal by himself or his successor as are the interlocutory decrees of a court open to review upon the final hearing.

New Orleans v. Paine, 147 U. S. 261;

Mich. Land and Lumber Co. v. Rust, 168 U. S. 589.

It has been the long established practice of the Department of the Interior to proceed in accordance with this principle, and so long as legal title remains in the Government the lands are considered public and under the jurisdiction of the Interior Department. The Secretary of the Interior has repeatedly exercised power and authority to review and reverse, upon the same record, the decisions of a preceding Secretary.

Parcher v. Gillen, 26 L. D. 34;

Cagle v. Mendenhall, 26 L. D. 177;

Harkrader et al. v. Goldstein, 31 L. D. 87;

Brooks v. McBride, 35 L. D. 441.

II.

The Bill Pleads Three Inconsistent Grounds for Relief.

The bill alleges three different adjudications at three different times and asserts that each one was a determination of a question which could be adjudicated only once by the Department. Three inconsistent grounds for relief are set up in the bill. Paragraph IV alleges that the non-mineral character of the land was determined by the relief from suspension in 1904. Paragraph V recites that the regulations of the Department in force in 1903 fixed the non-mineral character of the land as a rule of property and vested title in the State. Paragraph X alleges that Secretary Fall adjudicated this question in 1921. Yet respondent vigorously contended in the lower courts that one determination of this question would exhaust the powers of the Department. But if this issue had actually been determined in 1903 or in 1904, Secretary Fall had no jurisdiction over the question in 1921.

While the trial court based its decision on the ground that Secretary Fall adjudicated this question in 1921 and petitioner's principal argument will be addressed to that point, it is in order to dispose definitely at this time of the two grounds for relief set forth in Paragraphs IV and V of the bill. We shall then examine in detail the Sutro brief and argument before Secretary Fall in order to ascertain what, if anything, the

order of dismissal determined. In the lower courts respondent strenuously opposed the examination of the Sutro brief and argument. But as we shall later show, these documents are in effect part of the pleadings, which an appellate court may always examine to determine the nature of the issues, the relief requested, and the action taken in response thereto.

III.

The Order of 1904 Relieving Certain Lands From Suspension Was Not an Adjudication of Their Non-Mineral Character

By telegram of February 28th, 1900, to the Register and Receiver at Visalia, California, the Land Commissioner suspended from disposition until further orders, some forty-six townships aggregating in excess of 1650 square miles. Township 30 South, Range 23 East, in which the lands here involved were located, was included in this order (R. 11). This telegram was followed on July 19th, 1900, by a letter from the Land Commissioner to the Register and Receiver advising:

> "Suspension from disposition of certain townships by telegrams of February 26th and 28th last, will be continued for a reasonable time pending inquiry as to the true character of the lands which is now in progress. *These suspen-*

sions do not include mineral lands." (Italics ours) (R. 11)

It is manifest that the suspension here ordered was not absolute, but simply a suspension from agricultural entry. The lands were still open to entry and proof under the mining laws. In fact, as explained by Mr. Sutro in his brief and argument before Secretary Fall, this withdrawal was made on the petition of some 800 miners who charged that a great deal of mineral land in California was being acquired by agricultural entries and that they were being deprived of the opportunity of filing mineral entries (R. 37-8).

The southern portion of Township 30 South, Range 23 East, which included the Section 36 here involved, was surveyed in 1901 and 1902, and the survey accepted January 26th, 1903. The surveyor returned Section 36 as mineral in character and in the absence of any further proof on this subject, this return was *prima facie* evidence of the fact and fixed the character of the land accordingly. Any claimant or entryman alleging to the contrary would have the burden of proof.

Tulare Oil Co. v. S. P., 29 L. D. 269;
Barden v. N. P., 154 U. S. 288, 320.

On March 7th, 1903, the State of California filed Application No. 792, with the General Land Office for indemnity land, in the place of the said Section 36 on the ground that the latter was mineral land. This application was on file with the Department until November 20, 1905, when the state applied to amend the same by the substitution of new base lands (R.

49, Ex. 3). The state of California therefore during this period recognized and acknowledged the mineral character of Section 36. It had presumably satisfied itself that this section did not fall within the terms of its grant and had selected other lands in lieu thereof.

Rice v. California, 24 L. D. 14.

So long as its application aforesaid remained on file the State had, in fact, waived any claim whatsoever to this land under its school land grant.

California v. Deseret Water Co., 243 U. S. 415.

In 1903 a special agent of the Land Department made an examination of the lands covered by the withdrawal order of 1900 and reported those upon which he found actual producing wells of commercial quantity. On April 5, 1904, the Acting Commissioner of the Land Office wrote a letter to the Register and Receiver at Visalia, stating:

> "I am in receipt of the agent's report to the effect that certain of the lands so suspended are being developed for their deposits of mineral and that numerous oil wells have been sunk which have proved to be good producers of mineral. Other townships and portions of townships, have not been developed at all for wells that have been sunk have been proved to be barren. The lands upon which he states active mineral development is in progress will be allowed to continue suspended, but as to the following tracts where no mineral has been discovered it is believed that no good reason exists for further suspension. Ac-

cordingly the lands hereinafter described are hereby relieved from suspension." (Here followed list of 16 townships or portions of townships, including T. 30 S., R. 23 E.) (R. 16-17, Ex. F)

This order relieving said lands from suspension merely opened them again to agricultural as well as to mineral entry. Any one filing on said lands would have to make his proof as to character just the same after this order as before. It was simply an administrative act and of no more force or effect as an adjudication or determination of the mineral character than was the approval of the survey in 1903 with the surveyor's mineral return attached. The order to Agent Ryan directing the examination in question was dated December 10th, 1903. His report giving the results of his work is dated March 22nd, 1904. It is obvious that it was physically impossible for a special agent to make other than the most cursory examination of the large area covered by the forty-six townships within this period.

The conclusive proof of the fact that neither the report of the Special Agent above referred to nor the order of relief from suspension of 1904 amounted to an adjudication that these lands were not known mineral, is the decision of the Supreme Court in the case of *United States v. Southern Pacific*, 251 U. S. 1. In this case the Supreme Court found that some eight other sections of land in the same township in which the present Section 36 is located, one of said sections being immediately adjacent to Section 36, were known to be valuable for oil in 1904. This same decision disposes of any serious value imputed to the

examination by Agent Ryan, and his report thereon, in the following language (page 14):

> "The railroad company places some reliance on the fact that after the presentation of the original selection list and before the substituted one was tendered a special agent of the General Land Office examined the lands and reported them as non-mineral. But there is nothing in this that can help the company. The agent's report was made in another connection and was not considered by the land officers when they approved the selection. It did not relieve the company from showing that the lands selected were not mineral; nor did the company understand that it had any such effect. Mr. Eberlein knew of the report several months before he and other officers of the company became troubled over the proposed oil lease and concluded that, if given publicity, it would endanger the pending selection. Besides, if the report could be considered here, it would be without any real evidential value, for it appears from testimony given by the agent at the hearing that he was not a geologist or familiar with oil mining and that his examination of the lands was at best only superficial."

IV.

The Promulgation of the Regulations of March 6th, 1903, by the Interior Department Was Not a Determination of the Non-Mineral Character of the Land in Question

Respondent pleads in Paragraph V of the complaint that on March 6th, 1903, being thirty-eight days after the approval of the survey of the section in question, the Department of the Interior put into effect certain rules and regulations providing that a state would not be permitted to make selection in lieu of land within a school section alleged to be mineral in character, unless there was mineral actually discovered or exposed upon the base land. The paragraph further alleges that since no mineral had been discovered on this land prior to 1919, nor was there any mineral development in the township prior to 1911, the aforesaid rule and regulation became a rule of property and vested title in the State of California as of the date of the acceptance of the survey thereof.

On March 7th, 1904, the State of California filed its Application No. 792 with the Register and Receiver of the Visalia Land Office for indemnity land in lieu of said Section 36 on the ground that the latter was mineral in character. This application was accepted and pending in the Department until November 20th, 1905, when the state made application to amend the same by substitution of other base lands (R. 49-50, Ex. 3). The unquestionable effect of this procedure on the part of the state was to estop

it and its grantees from claiming any rights based on the non-mineral character of the land. The state did in fact, for this period, waive any claim to the land in question, because it was setting up affirmatively the mineral character of the same. Under the Act of Congress this constituted a waiver.

Sec. 2275 Rev. Stat. of the United States, as amended in 1891 (26 Stat. 796) provides in part:

> "• • • And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. • • •"

This section has been construed by the Land Department and by the Supreme Court of the United States as meaning that the state does waive its right to a school section when it applies for other lands in lieu thereof.

California v. Deseret Water Co., 243 U. S. 415;

Gregg v. Colorado, 15 L. D. 151 (1892);

Rice v. California, 24 L. D. 14 (1897);

State of California, 28 L. D. 57.

The Department regulations of 1903 were in effect rules of evidence prescribing the kind of proof which the Department proposed to require in support of an application by a state to exchange base school lands.

Respondent argued, both before Secretary Fall, and in this case, that since the state under these rules would not have been permitted to exchange Section 36 for lieu lands, it must follow that the state was entitled to retain this section under the school grant. Put in another form, it says that if the Rules of 1903 had been applied to the state's application to exchange this land, it would have resulted in a denial of the application, and the denial of the application would have been a determination of the non-mineral character of the land.

The answer to this argument is that in fact the rule never was applied to this application, nor was this application ever denied by the Interior Department. The State of California by selecting other lands in lieu of Section 36 had, under Section 2275 of the Revised Statutes above quoted, voluntarily waived any claim to this land, during the period that such application was on file with the Department.

It is also important to note that the so-called Rules of 1903, in so far as they purported to prescribe that land would not be considered mineral in character by the Interior Department unless there was mineral actually exposed or discovered upon the precise lands in question, were by no means uniformly followed by the Department.

In *Kern Oil Company v. Clotfelter*, 30 L. D. 583 (May 8, 1901), Clotfelter had selected lands in the

Visalia Land District in lieu of lands in the Forest Reserve and filed the necessary affidavits and proof. Kern Oil Company had protested on the ground that the lands were mineral. The Acting Secretary of the Interior instructed the Commissioner of the General Land Office to hold a hearing and directed that evidence bearing on the character of the selected lands be not restricted to the discovery or development of mineral therein and to their geological formation, but might extend to the discovery and development of mineral in adjacent lands and to their geological formation.

This case was again before the Department and the instructions approved on October 28th, 1904. Reported in 33 L. D. 291.

The matter of the character of evidence to be considered in passing upon alleged coal lands was considered at length by Secretary Hitchcock in his opinion of October 26th, 1905. 34 L. D. 194. The Secretary here reviewed at length the various decisions of the courts and of the Land Department and found that nowhere has outside geological evidence been held inadmissible, and ruled that reliance must frequently be had upon such evidence as guides the geologist and the coal expert.

It is evident from the foregoing that the so-called Rules of 1903, were not uniformly adhered to and they were virtually abrogated by Secretary Hitchcock's decision above quoted in October, 1905. In any event, the *Diamond Coal* Case, 233 U. S. 236 (1914), and the *Southern Pacific* Case, 251 U. S. 1 (1919), had firmly fixed the principle that the mineral character

of land must be determined by a consideration of the geological indicia and structural conditions upon the surrounding area as well as the lands in question, when the hearing before Secretary Fall was had in June, 1921.

The trial court's finding that Secretary Fall had held a hearing and rendered a decision on the merits on the charges then pending against Section 36 cannot be supported by the so-called "rule of property" argument unless this court is prepared to announce that the existence of a rule of evidence is the equivalent of an adjudication, and to so announce in the face of the fact that the rule of evidence was not uniformly followed nor was it ever applied by any official of the government in the consideration of the charges pending.

It must be admitted that the rule in question had been cancelled and abrogated by the decisions of the Supreme Court of the United States many years before this question came before Secretary Fall. Upon what possible ground could it be contended that the existence of a rule of evidence, long since cancelled and annulled, can be invoked to take the place of a positive duty imposed upon the Department of the Interior, to-wit, the determination of the known character of this land in January, 1903? This claim falls of its own statement.

V.

The Equities in This Case Are Adverse to the Claim of Respondent

Counsel for respondent in the hearing before Secretary Fall, and in his brief, referred at length to the "many and compelling equities" in claimant's favor. A careful examination into the history of this section demonstrates that respondent can show no equities as against the government. On the other hand the claim of the government to this land, and particularly the position that the mineral character of the same had never been determined by the Interior Department, has been consistently maintained from the beginning, and long prior to the initiation of any claim in behalf of private individuals thereto. Any rights set up by respondent or its predecessors in title, have been acquired with full knowledge of the fact that they were dealing with lands in which the government still claimed an interest and had consistently asserted that it had not yet determined the mineral character thereof.

No rights adverse to the government could possibly have been initiated by the attempts of the State of California in 1901 to sell this land to Alice J. Miller, to tax the same in 1901, to foreclose any purported lien for such taxes, nor by the attempt of Hay and Buffington in August, 1908, to redeem said land from such alleged taxes. The state could not possibly claim any interest in this section prior to January 26, 1903, when the survey was accepted and approved.

Hay and Buffington also undertook to buy this section from the state (R. 18-19, Ex. I and J). Their applications to the State Surveyor General were dated August 24th, 1908, and were probably filed a few days later, although the exact date of the filing does not appear. Under the provisions of the California Statute, extracts from which are printed upon the applications themselves, all applications had to be retained in the office of the Surveyor General ninety days before approval. There is nothing in the record to show when such approval was had except that the State of California issued its purported certificate of purchase upon said applications on January 5, 1909, and thereafter the applicants paid the purchase price to the state for said land (Par. VIII, Complaint. R. 56).

However, on September 14th, 1908, Section 36, together with other lands located in Kern and San Luis Obispo Counties, was ordered temporarily withdrawn from agricultural entry pending examination and classification by the United States Geological Survey (R. 91, Ex. 12). This order was part of the official public records on file in the United States Land Office at Visalia, California, and in the records of the Department of the Interior at Washington, D. C. It follows that practically four months before the issuance of certificates of purchase to Hay and Buffington, and any payments by them thereon, the lands in question were withdrawn from entry pending classification by the Geological Survey. These purported purchasers are charged with knowledge of the government's adverse attitude towards these lands and

of the position which the Interior Department has consistently maintained to the effect that the mineral character of Section 36 had never been adjudicated by the Department. On June 4th, 1909, the Director of the Geological Survey classified all of the township within which Section 36 is located as oil lands (R. 92, Ex. 13). Three days later the Secretary of the Interior continued the withdrawal of this section, together with other lands, pending consideration of legislation on the question (R. 92, Ex. 14).

On September 27th, in the same year, the Acting Secretary placed this section, together with other lands, in Petroleum Withdrawal No. 5. The order recited:

> "In the aid of proposed legislation affecting the use and disposition of petroleum deposits on the public domain all public lands in the accompanying lists are hereby temporarily withdrawn from all forms of location, settlement, selection, filing, entry or disposal under the mineral or non-mineral public land laws." (R. 93, Ex. 15)

The foregoing orders were all part of the official public records on file in the United States Land Office at Visalia, and in the records of the Department of the Interior at Washington, D. C. (R. 93, Ex. 15), when on November 29th, 1909, Oscar Sutro purchased from Hay the latter's interest in 480 acres of said Section 36. The claim of the government in respect to this land, and the attitude of the Department that the same had not theretofore been determined to be non-mineral is certainly shown by these public records, and neither Hay, Buffington, Sutro nor Car-

man, who undertook on August 21st, 1909, to buy 158 acres of this section from Buffington, can claim that they were innocent purchasers without knowledge of the government's adverse claim to this land when they spent their money. The records charge them with knowledge of the government's claim and show that they purchased these lands with their eyes open and proceeded at their peril.

The subsequent history of the section, so far as the government's claim is concerned, is wholly consistent with its attitude above noted. On July 1st, 1910, the Secretary of the Interior recommended to President Taft the withdrawal of certain lands including the township within which Section 36 is located, for a petroleum reserve. This recommendation was approved by President Taft on July 2nd, 1910, and returned to the Department of the Interior for appropriate action (R. 94, Ex. 16).

By executive order of President Taft on September 2, 1912, Naval Petroleum Reserve No. 1 was created and Section 36, together with other sections, placed therein (R. 95, Ex. 17).

On January 14th, 1914, the Commissioner of the General Land Office directed the Register and Receiver at Visalia to hold a hearing on charges against Section 36, reciting:

> "1. That the land is mineral in character containing valuable deposits of petroleum.
>
> "2. That the land was known to be mineral in character at and prior to the date of survey December 20, 1901." (R. 35, Ex. 1)

No action was taken upon these charges which re-

mained pending until March 2, 1921, when they were amended by the Commissioner to charge that the land was known to be mineral in character at and prior to the date of the acceptance of the plat of survey on January 26, 1903. The Register and Receiver was directed to proceed in accordance with the department's circular of February 26, 1916, copy of which has been set forth on pages 12-16 of this brief (R. 75-6, Ex. 1)

Respondent began its first well on this section in 1918 and struck oil there in January, 1919.

It is apparent from the foregoing that respondent's position is devoid of any support from the equities. It did not purchase the land until after the same had been withdrawn from mineral entry pending proposed legislation and after it had been classified as oil land by the geological survey. Before it undertook any drilling on this section, the land had ben definitely and permanently withdrawn from all manner of entry and included within Naval Reserve No. 1, by executive order of President Taft. In addition thereto, at the time respondent began drilling, the contest ordered by the Commissioner of the General Land Office on January 14th, 1914, had been pending and undisposed of four years.

Some point was made by Mr. Sutro in his argument before Secrtary Fall and also is recited in paragraph VII of the complaint, to the effect that on January 24, 1908, the Land Office at Visalia had certified to the State Surveyor General that there was no claim shown in the records of his office, adverse to that of the State of California to said Section 36. The au-

thority of the Local Land Office to issue such a certificate, and the significance of the same, has been disposed of by both the Interior Department and the Supreme Court.

Secretary Hitchcock on January 20th, 1902, 31 L. D. 212, advised the Commissioner of the General Land Office as follows:

> "While it is competent and proper for the local officers, in response to legitimate inquiries, to give such information as is shown by the records of their office, as for instance, whether a given Section 16 has been returned as mineral or non-mineral, or whether any portion thereof is or is not included in a homestead or other entry, it is not *competent* or *proper* that these officers should also undertake to state in a manner which may be erroneously accepted as a certification or authorized statement that the section has or has not passed to the state."

In *Cosmos Co. v. Gray Eagle Co.*, 190 U. S. 301, the Local Land Office had given a similar certificate which certificate was alleged to be a decision that the selector of lieu lands had complied with all the provisions of the statute so as to acquire a complete equitable title. The court says on page 313:

> "They (the local land officers) entered that selection upon the official records of the land office and they certified that it was free from conflict, and that there was no adverse filing, entry or claim thereto, but it cannot be said that they decided that the selector had complied with the provisions of the statute or that he had done

all that he ought to have done in order to acquire his alleged complete, equitable title.

"Their certificate that the land was free from conflict was simply a certificate as to what appeared on the books of the local office, and the same may be said of the statement that there was no adverse filing, entry or claim thereto upon such books."

Respondent cannot create a title on grounds of estoppel or based upon the so-called equities. This was the dominant note in Mr. Sutro's brief and argument before Secretary Fall and is again advanced in the bill of complaint herein. But these considerations are of no avail unless and until it is shown that title has actually passed from the government. The government cannot be divested of title until there has been an adjudication by the Interior Department that this section was not known mineral on January 26, 1903. No such adjudication has ever been had. A similar situation was before the Supreme Court in the case of *Lee Wilson & Co. v. United States*, 245 U. S. 24. Here the original survey had erroneously shown the existence of a lake within a certain township when in fact there was none. The position of the alleged lake was shown by meander lines upon the survey and a patent was issued by the government to the State of Arkansas describing the entire township. Approximately fifty years later the government investigated this situation and discovered the error. The area embraced within the meander lines was surveyed and thrown open to the public whereupon this contest arose between the United

States and the grantees from the state who claimed a portion of the land under alleged riparian rights. The court held against the claim of riparian rights and said (p. 32):

> "Finally, the suggestion that as the defendant holding under the State acquired its rights before the mistake was discovered in reliance upon the actions and representations of the officers of the United States as to the existence of riparian rights in accordance with the state law as the result of the meander line, the United States should not be permitted to correct the mistake committed as to the meander line and thus protect its title, but in a different form restates the argument which we have already disposed of. Besides, if for the sake of argument we assume the existence of the equitable considerations insisted upon, it is manifest that the prayer for their enforcement is in the nature of things beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government."

VI.

Secretary Fall's Order of Dismissal Was Not a Determination of the Non-Mineral Character of the Land as of January 26th, 1903

Petitioner is entitled to a reversal of the decree in this case for the reason that the judgment of the Supreme Court was based upon error in that it found

as a fact that Secretary Fall granted the hearing June 8th, 1921, for the purpose of determining the issues raised by the adverse proceedings then pending, that he had before him evidence which he had a right to consider and which supported his dismissal of said adverse proceedings, that the order of dismissal was a judicial determination of the non-mineral character of the land as known on January 26th, 1903, and that said order of dismissal was a judgment on the merits. These points are covered by assignments of error II, III, IV and V and will be discussed together.

The basic question involved in this case is what did Secretary Fall decide by this order of dismissal? The notices sent to the Navy Department and the Attorney General by Secretary Fall's administrative assistant, Mr. Safford, recited that the Standard Oil Company and the Pan American Oil Company had asked to be heard orally in the matter of the proposed proceedings by the government to determine whether or not said section passed to the State of California under its School Grant, that the Secretary had agreed to hear these on June 8, 1921, and would be glad to have representatives of the departments present if they so desired. The notices sent by First Assistant Secretary Finney were less specific and simply stated that the Secretary had agreed to hear representatives of the Standard Oil Company and Pan American Oil Company orally on June 8th, with reference to the proceedings instituted relative to Section 36 (R. 89-90). There was nothing in either one of these notices which were addressed to the Attorney General's office and to the Secretary of the Navy which gave

the slightest intimation that Secretary Fall proposed to conduct a hearing upon the merits of the issues involved by the proceedings then pending in the Land Office.

On May 26th, 1921, two days before said notices of hearing were sent out, Mr. Sutro in behalf of the claimants filed a brief with Secretary Fall setting forth his argument and authorities. The note of transmittal indicates that matters set forth in the brief had been discussed by him with Secretary Fall on the previous day (R. 89). An examination of this brief demonstrates conclusively, we believe, that Mr. Sutro was not asking the Secretary to decide as a matter of fact, that the lands in question were not known mineral lands in January, 1903, but rather to decide that the Department had heretofore adjudicated the non-mineral character of the lands and settled the question, and the issue was a closed question so far as the Department was concerned (R. 79-89).

It is important to note that in November, 1919, the case of *United States v. Southern Pacific* (251 U. S. 1) was decided. This was an action brought by the government to cancel a patent issued in December, 1904, to the Southern Pacific covering certain lands in the same township in the Elk Hills area, part of which were in fact immediately contiguous to the Section 36 here involved.

The lands in question were sought by the railroad as lieu land to replace lands of like area lost in the primary grant to the road. The court found that the affidavits of the company's land agent filed with the applications for such lieu lands in November,

1903, and again in 1904, reciting that the lands had been examined by the agents of the company and that none of the lands returned in the list were believed to be mineral lands, were false; that the company in 1902, upon the recommendation of its geologists, had withdrawn from sale, lands adjacent to those in suit because they were in or near oil territory; that in 1903 the company had selected certain adjacent and adjoining lands to be transferred to its fuel oil company; and that in fact, the officials of the company were seeking to secure the lands in question believing that they were chiefly valuable in their mineral content. The court said, after discussing the general geological conditions upon the Elk Hills area and the surrounding country:

> "Geologists and men of wide experience and success in oil mining—all of whom had examined that territory and some of whom had been familiar with it for years—were called as witnesses by the Government and gave it as their opinion, having regard to the known conditions in 1903 and 1904, as just outlined, that the lands were valuable for oil, in that an ordinarily prudent man, understanding the hazards and rewards of oil mining and desiring to engage therein for profit, would be justified in purchasing the lands for such mining and making the expenditures incident to their development, and in that a competent geologist or expert in oil mining, if employed to advise in the matter, would have ample warrant for advising the purchase and expenditure.

"Other geologists and oil operators, called by the company, gave it as their opinion that the lands were not, under the conditions stated, valuable for oil; but as respects the testimony of some it is apparent that they were indisposed to regard any lands as within that category until they were demonstrated to be certainly such by wells actually drilled thereon and producing oil in paying quantities after a considerable period of pumping. This is a mistaken test, in that it takes no account of geological conditions, adjacent discoveries and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures. And the testimony of some of these witnesses is weakened by the fact that their prior acts in respect of these lands, or others in that vicinity similarly situated, were not in accord with the opinions which they expressed." (pp. 12-13)

It is thus manifest that when Mr. Sutro applied for the oral hearing before the Secretary, both he and the Secretary were aware that no hearing on the merits as to Section 36, could be held without the taking of testimony, and in all probability very extensive testimony, upon the structural conditions and geological indications not only upon the section in question, but upon the general area surrounding the same. This was the law of the case established by the Supreme Court according to the view of Assistant Secretary Finney as expressed by him at the oral hearing and prior conferences he attended. Since there was no

provision either in the rules or practice of the Interior Department for taking testimony on disputed points before the Secretary, it was obvious that no hearing on the merits could have been contemplated at the oral hearing on June 8th, 1921.

Mr. Sutro's entire argument, set forth in his brief and his remarks at the hearing, was that it was not necessary to go into this question of the surrounding geological conditions or to try out the charges then pending before the Department because the mineral character of this section had already been determined and adjudicated, and the title vested in his clients. Moreover, this insistence upon a prior determination of the non-mineral character of the land has never been abandoned by respondent. It is reiterated in the bill of complaint on which this suit rests.

This was an illogical position for the transferees to take in asking for an oral hearing before Secretary Fall. If in fact the non-mineral character of the land had previously been adjudicated by the Department, then the title had passed from the United States and the Department of the Interior had no further jurisdiction and could make no further ruling concerning the same.

Wyoming v. U. S., 255 U. S. 489.

On Mr. Sutro's theory of the situation his hearing should have been before the courts and not before the Secretary of the Interior, whose Department had no further jurisdiction after it had once adjudicated the non-mineral character of the land and the title had passed from the Government.

Brown v. Hitchcock, 173 U. S. 473.

Paragraph IV of the complaint, after setting forth a copy of the report of the Special Agent of March 22, 1904, alleges:

> "Thereupon by order dated April 5th, 1904, the Acting Commissioner of the General Land Office relieved said Section 36, and said other lands, from suspension and *determined* that said Section 36 and said other lands were non-mineral lands and plaintiff represents that thereupon the title of the State of California to said Section *was finally determined and settled.*" (Italics ours) (R. 4)

In paragraph V of the complaint, after quoting rule 2 of the Regulation of the Department of March 6, 1903, and reciting that no mineral had actually been discovered on Section 36 at the date of the acceptance and filing of the survey, it is alleged:

> "That pursuant to the rules and decisions of the Department of the Interior the title of the State of California and its grantees to said Section 36 became vested in the State of California as of the date of the acceptance of the survey thereof."

The extracts hereinafter set forth from Mr. Sutro's brief show the error of the lower court's findings that Secretary Fall was conducting a hearing upon the merits on the adverse charges against this section. It certainly cannot be contended that Secretary Fall did more than he was asked to do by Mr. Sutro as attorney for the transferees.

Not once did Mr. Sutro ask the Secretary to decide the question raised by the pending charges, of

whether or not this Section was known mineral land in 1903. His entire efforts were devoted to avoiding such an investigation and inquiry and to persuading the Secretary that "It would serve no purpose" to proceed with the pending hearing and investigation on this point before the local land office. The result is, as pointed out by Chief Justice McCoy, in his opinion denying the injunction *pendente lite*, that this primary question has never been decided by the Secretary of the Interior.

The following extracts taken from Mr. Sutro's brief establish this fact. The italics are ours except where otherwise indicated. The opening paragraph of the brief recites:

> "This is the argument in support of the request that the Secretary of the Interior decide that in view of the previous action of the Department and of its regulations in force in January, 1903, the title to said section is vested in the State of California or its grantees." (R. 79, Ex. 5)

The following paragraphs emphasize the same points, viz:

> "Section 36 of 30-23 was identified by the survey, of which the official plat was approved in Washington on January 26, 1903. In 1904 there was a *determination* by the Commissioner of the General Land Office that the section was non-mineral." (R. 79, Ex. 5)
>
> "This restoration of the land to 'disposition under the agricultural land laws' is necessarily a *determination* of its non-mineral character.

The order contains, moreover, the specific finding that 'no mineral has been discovered' in township 30-23." (R. 80)

"In 1919 sixteen years after the survey, fifteen years after *determination* that the land was non-mineral, ten years after purchase from the State, the present owners drilled the property and discovered oil. Immense investment has been made on it, and now, seven years after these proceedings were instituted, of which no notice was taken by any one, it is proposed that the Government shall assert that the State took no title to the land because it was well known to be mineral at the date of the survey. It is proposed to assert the mineral character of the land in 1903 not because of the discovery of mineral on the section (which was the test under repeated regulations and decisions of the Department for determining the mineral character of a school section in place *see infra*) but because under the rule of the *Diamond Coal & Coke* case the geological structure was such as to establish the character of the land as well known mineral land." (R. 81)

"*Such a determination was had here.* It is said that the report on which it was based was superficial. The State of California and its bona fide grantees are not responsible for that. The State of California could not look behind the order of the Department restoring the land to entry as non-mineral. The Department's general finding may not avail a homestead entryman, or a

desert entryman, or an applicant for railroad patent or a lieu land section. In each of these cases the applicant selector or entryman is required to prove the non-mineral character of the land. A *general determination by the Department* may aid him but it is not necessarily conclusive. But the case is *different where a school section* in place is involved. There the only proceeding is a determination, ex parte or otherwise by the Interior Department to fix the character of the land. That is why this case differs from the *Elk Hills* case, the Scrippers' cases, etc. And it should also be noted that in railroad grants the railroad's belief and representations are of the essence of the matter." (R. 82)

"First—*We are not asking for a dismissal of the proceedings now pending in the Land Office.* We are asking the Department to decide that the proceedings should be closed on the ground that (a) The previous adjudication of the non-mineral character of the land, made seventeen years ago, upon which the State acted in selling the land twelve years ago, *determined* its character in favor of the State and its bona fide grantees. (b) At the date of the survey in 1903 the doctrine of the Diamond Coal & Coke case decided in 1914 and of the Elk Hills case was not applicable to this section; that as a *section in place* title to this section vested under the prevailing rules and decisions of the Department, no mineral having been discovered on the *section in place*; that this became and is the rule of property for

this case." (All except first two lines, Mr. Sutro's Italics) (R. 86)

"There is no reason why this decision as to the title of the State should not be made now without putting the State to the enormous and costly burden of proof, such as was in issue in the *Elk Hills* case. In other words, if the absence of clear proof of the mineral character of the section in 1903 in the shape of discovery of mineral was sufficient to characterize the land as non-mineral under the regulations and repeated decisions of the Department, it will make no difference that by the application of the principles of the *Elk Hills* case it could be successfully shown that the land within the reasoning of that decision was believed to be mineral lands." (R. 87)

"Certainly the equities of this situation entitle us to a decision now on the question which in any event will ultimately have to be decided by the Secretary of the Interior. The issue which we now tender can be decided just as well at this time as at the end of a protracted hearing on the facts. The fact that the land was tendered when its character was unknown in 1916 to the government, the long lapse of time since the approval of the survey, *the determination* of the non-mineral character of the land by the Department, the sale by the state of the land in reliance on *that determination*, the many years thereafter in which no claim adverse to the State was brought to its attention, although an adverse pro-

ceeding was ordered and allowed to lie dormant for seven years, the fact that without objection the purchasers from the State were allowed to develop the land, the proceedings slumbering for seven years on top of ten years after the survey—these facts I submit offer equities which entitle the State to ask that the *Secretary of the Interior should exercise his clear jurisdiction and decide the question presented at this time.*" (Mr. Sutro's Italics) (R. 87)

"Third—Nor are we asking the Department to make a ruling which is at variance with the *Elk Hills* decision. Whatever force the findings of fact in that case may have in a case that is free of fraud, this case is, in no event, within the scope of the Elk Hills decision. The *determination* by the Department in 1904 of the land as non-mineral may have been only evidence in favor of the railroad in that case, and very slight evidence under the peculiar circumstances of the case; in our case we submit *it was an adjudication.*

"The court in the Elk Hills case said that the Ryan report could not help the railroad because 'the agent's report was made in another connection,' and that connection I submit was precisely the *ex parte determination* by the Department of the character of the land for cases where such *ex parte determination* is the only determination possible." (R. 88)

In other words, Mr. Sutro was urging Secretary

Fall to prosecute no further the charges in the Land Office but to close this contest on the ground that,

1. The Department had *already determined* the *known mineral character.*

2. That title was vested in the State under the so-called rule of property, and

3. That it was inequitable to prosecute this contest in view of the various delays and vacillations of the Government.

The foregoing were the considerations which had been urged by Mr. Sutro upon Secretary Fall at the time the latter sent out the notices of the hearing of June 8th, 1921. The notices contain nothing which indicates any intention on the part of the Secretary to interfere with the orderly procedure prescribed by the rules of the Department for the trial of the charges pending, or to determine the merits himself by any short cuts, nor was he asked by Mr. Sutro, either in his brief or in his oral argument to do so. We are fortunate in having a stenographic record of everything that took place at the hearing itself, which is attached to the answer as Exhibit 2 (R. 37-49). In opening his argument, Mr. Sutro said:

> "This is an application, Mr. Secretary, to have the Department of the Interior exercise its jurisdiction to determine that section 36 in township 30 south, range 23 east, in Kern County, in California, is a school section in place, title to which is vested in the State, and that the title has been so vested since the day of the survey and the approval of that survey, which was, if I remember correctly, March, 1903, or possibly

since the filing of the approved plat, which would be a month later." (R. 37)

In discussing the Ryan examination of 1904, Mr. Sutro said:

"He (Ryan) made an investigation, and he made a report, and his report was that Township 30 South, Range 23 East, which includes this section, was not mineral. The Secretary of the Interior thereupon restored that township and a great many other lands to agricultural entry. And we claim that that was an *adjudication* of the character of this land." (R. 38)

"After the Navy had declined that tender the land lay dormant, as it had been lying dormant for thirteen or fourteen years, until the great oil shortage of 1919, when the Standard Oil Company, which drilled everywhere where a drill could be dropped at that time with any hope of success, drilled this section and discovered oil. Now that was fifteen years after the land had been classified by the Department. It was nine years after the Government had indicated that it might assert a claim to the land, and I submit that on the theory of laches and limitations alone it is an inequitable proceeding, and one that Government, if there is ever to be any security of titles, should not foster." (R. 39)

On page 44 of the Record, after discussing the so-called rule of property, he says:

"Now so much for this question as to whether or not this section, in the absence of discovery

of mineral, could be considered a mineral section. I think it could not."

"The other point upon which we rely is to my mind quite conclusive, and that is that in 1904 this Department classified this section as non-mineral."

Again, on page 46 of the Record, in discussing the importance of definitely settling the titles to land, he says:

"And I submit that in this case, where there is no fraud, no possible allegation of fraud, where the state five years after the classification of this land sold it in good faith to people who bought it in good faith, and who held it for ten years, and who have now invested some millions of dollars in the land, that the time has passed when the United States can assert its title thereto, and *that the United States is estopped by the judgment of this Department that this was non-mineral land in 1904*, and by its own regulations which defined it as non-mineral land in 1903."

The lower courts were clearly wrong in holding that the hearing of the Secretary of June 8th, 1921, was a hearing and determination on the merits. The charges which were pending in the land office at the time could only be determined in accordance with the established procedure of the Department and the law laid down by the court. The procedure was fixed in the order directing the hearing as prescribed in the Department circular of February, 1926, hereinbefore set out, which called for

an orderly hearing upon due notice given, and the opportunity to examine and cross examine witnesses under oath on disputed questions. The law applicable to the contest had been laid down by the Supreme Court in *United States v. Southern Pacific* (*supra*) wherein it was provided that the test of known mineral lands was not the actual production of mineral from the specific lands themselves, but rather "geological conditions, adjacent discoveries and other external conditions upon which prudent and experienced men in the oil mining regions are shown to be accustomed to act and make large expenditures."

The agreed statements of facts recites (R. 72):

> "It was the contention of the transferees from the state, with which contention Assistant Secretary Finney disagreed at the hearing, that it could serve no purpose to take evidence in the local land office to determine the question whether or not said section or the lands adjacent thereto showed structural and geological conditions indicative in 1903 of the existence of oil on said section under conditions justifying development therefor, for the reason that said question presented an immaterial question of fact and said question was not argued or discussed at the proceedings held on June 8th, 1921, or at any conferences prior thereto, between the representatives of the transferees and the Secretary of the Interior or the First Assistant Secretary of the Interior, except as shown in the brief (Exhibit 5) and in the transcript of proceedings (Exhibit 2) attached to answer."

Being well aware of these facts Mr. Sutro was seeking a way to avoid the delay and expense of such a hearing or trial on the charges pending. He believed that the course of dealing by the Department with this section amounted to a prior adjudication of the character of the land and this was the burden of his argument before Secretary Fall.

Secretary Fall did not adjudicate or purport to adjudicate this case on the merits on the charges then pending. His order of dismissal was a decision to drop the matter at that point. If he had intended to decide the case on the merits, it would have been a simple matter for him to have announced a finding of fact to that effect, and certainly the able and learned counsel, who was representing claimants, would have called this matter to his attention had he been seeking a decision on the merits.

The unavoidable conclusion to be gathered from the study of Mr. Sutro's brief filed with Secretary Fall at the time he was requesting the oral hearing and from his argument and the proceedings had at said hearing, is that Secretary Fall did not decide, nor was he asked to decide, the known mineral character of this land in 1903, and that Chief Justice McCoy was correct in his opinion rendered at the time he denied the application for the temporary injunction when he said, referring to Mr. Sutro's argument before Secretary Fall:

> "It would make this opinion too long to quote all the argument of counsel. It is enough to say that his argument before the Secretary of the Interior was substantially what it is here,

and therefore the inference which the court draws from the foregoing colloquy is that the Secretary ruled as a matter of law that title to the lands in question was finally determined to be in the State of California in January, 1903, when the plat of the survey was approved or in April, 1904, when the lands were relieved from suspension. The Secretary did not determine that the lands were not known in 1903 to be mineral. He said in substance that it was not worth while to waste time to inquire as to that, for even though the evidence taken on the contest might show that the lands were known to be mineral still he could not find so, as the inquiry as to that had been precluded by the department. If the action of Secretary Fall was final, then there never has been and never will be a determination of the contest directed by the department in 1914, notwithstanding that since 1900 the department has from time to time shown that it considered the question to be an open one." (R. 58)

VII.

THE SUTRO BRIEF AND ARGUMENT BEFORE SECRETARY FALL CONSTITUTE RESPONDENT'S ANSWER TO THE CHARGES THEN PENDING AND CONSTITUTE PART OF THE PLEADINGS IN THAT CASE. THIS COURT MAY EXAMINE THE PLEADINGS AND EVEN THE TESTIMONY TO ASCERTAIN WHAT THE ORDER OF DISMISSAL MEANT.

Mr. Sutro's brief and his argument before Secretary Fall constitute the answer of respondent to the charges then pending and are analogous to the pleadings in a case. The order from the Commissioner of the General Land Office of March 2, 1921 (R. 75), which directed the Register and Receiver to file charges against this land on the ground that the same was known to be mineral in character in 1903, directed said Register and Receiver to proceed in accordance with the Circular of February 26, 1916 (44 L. D. 572).

This Circular of February 26, 1916, is set forth in appellant's opening brief beginning on page 8, and requires the claimant (par. 5) to file a written denial under oath of the charges with an application for a hearing, or to submit a statement of facts rendering the charges immaterial. The contest then proceeds to a hearing upon the issues thus raised. In effect the written charges of the Department and the claimant's denial under oath or written statement of facts, constitutes the pleadings upon which the con-

test is heard. This Circular also recites that the proceedings will be governed by the Rules of Practice of the Department. Rule 13 of the Rules of Practice specifically provides that the party served with notice must within thirty days after personal service or twenty days after the fourth publication of notice "file with the Register and Receiver answer under oath specifically meeting and responding to the allegations of the contest * * *." It is therefore manifest that the procedure before the Department requires the claimant to file an answer or its equivalent, in the nature of a "written denial under oath of said charges with an application for a hearing," or a "statement of facts rendering the charges immaterial." These documents together with the charges constitute in effect the pleadings upon which this contest is heard.

The record in this case shows that the only document filed by respondent in the nature of an answer, or "a statement of facts rendering the charges immaterial," was the written brief by Mr. Sutro filed with Secretary Fall on May 26, 1921 (R. 79). This brief, together with the stenographer's transcript of Mr. Sutro's argument before the Secretary constitutes the only record in this case of the answer of the respondent to the charges then pending before the Department. The Government has always taken the position that it was absolutely necessary in determining what Secretary Fall decided to examine this brief and argument. It is elementary law that the pleadings in any case and where necessary, even

the testimony, may be examined to ascertain what a court decided.

One of the leading cases on this question is *Russell v. Place*, 94 U. S. 606, where Justice Fields in a careful opinion, which has been repeatedly approved, discussed the right to resort to extrinsic evidence to determine the scope and effect of a prior judgment and said:

> "It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible." (Page 608)

Rule affirmed in

DeSollar v. Hanscome, 158 U. S. 216, 221.

One of the earliest cases discussing the nature of the evidence to be considered in determining whether or not a former trial between the same parties amounted to *res adjudicata* is *Packet Company v. Sickles*, 5 Wall. 580. The court said:

> "As we understand the rule in respect to the conclusiveness of the verdict and judgment in a former trial between the same parties, when the judgment is used in pleading as a technical estoppel, or is relied on by way of evidence as conclusive, *per se*, it must appear, by the record of the prior suit, that the particular controversy sought to be concluded was necessarily tried and determined—that is, if the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties; and further, in cases where the record itself does not show that the matter was necessarily and directly found by the jury, evidence *aliunde* consistent with the record may be received to prove the fact; but, even where it appears from the extrinsic evidence that the matter was properly within the issue controverted in the former suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded." (p. 592)

On the following page (593) the court further said:

> "The evidence should be confined to the points

in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration, and then the record furnishes the only proper proof of the verdict."

The above opinion is affirmed in *Fayerweather v. Ritch*, 195 U. S. 276, 306.

In *National Foundry v. Oconto Water Co.*, 183 U. S. 216, at page 234, the court said:

"It is elementary that if from a decree in a cause there be uncertainty as to what was really decided, resort may be had to the pleadings and to the opinion of the court in order to throw light upon the subject. *Baker v. Cummings*, 181 U. S. 117; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683."

In *Hornbuckle v. Stafford*, 111 U. S. 389, at page 393, the court says:

"The decree having been put in evidence, it was clearly erroneous to exclude the pleadings upon which this decree was based. Even parol evidence is admissible when necessary to show what was tried in a suit, the record of which is offered in a subsequent action between the same parties. *Campbell v. Rankin*, 99 U. S. 261."

In the case of *Baker v. Cummings*, 181 U. S. 117, a general order of dismissal in a previous suit was pleaded as a bar to a later case between the same parties. The defendant alleged that the order of dismissal was not a final adjudication based on the merits but rather based upon the laches of the plaintiff. The Supreme Court, in order to determine this

question, examined in detail the opinion in the prior case.

Washington Gas Co. v. Dist. of Columbia, 161 U. S. 316, 329, the court said:

> "* * * The elementary rule is that for the purpose of ascertaining the subject-matter of a controversy, and fixing the scope of the thing adjudged, the entire record, including the testimony offered in the suit, may be examined. *Russell v. Place*, 94 U. S. 606, 609, 610; *Cromwell v. County of Sac*, 94 U. S. 351, 355, 356; *Lewis v. Ocean Navigation & Pier Co.*, 125 N. Y. 341, 348; *Littleton v. Richardson*, 34 N. H. 179, 188; Freeman on Judgments, §273, and authorities there cited."

VIII.

Section 36 Could Not be Alienated From the Government Except by an Adjudication of Its Non-Mineral Character by the Interior Department

The injunction granted by the lower Court in this case must be vacated and the judgment reversed unless it appears that the title to Section 36 has actually passed from the United States. Until the government is absolutely divested of this legal title the Interior Department has complete jurisdiction over this section and may prosecute the charges now pending against this section. The title to a so-called

school section remains in the United States until the Interior Department has determined that the same was not known mineral at the time of the approval of the survey. The only proceeding by which the federal government could be divested of this title was such a determination.

Secretary Fall on the hearing of June 8, 1921, did not decide the non-mineral character of this land as of the date of the approval of the survey. There were specific charges pending in the Department against this section to determine which, on the merits, required the taking of extensive testimony under the law laid down in the case of *United States v. Southern Pacific*, 251 U. S. 1. There was no provision either in the rules or practice of the Department whereby Secretary Fall could take such testimony (R. 73), and furthermore Mr. Sutro was urging him that it was not necessary to go into this controversy because the Department had theretofore adjudicated this question.

This brings us to the consideration of whether the Secretary could divest the United States of title to this land by ruling that there had been a determination of this question unless such a determination had actually been made. We do not believe that the Secretary had any such power. He was authorized under the law to determine the character of the land and had already filed charges and commenced proceedings looking towards the adjudication of this question. It was not within the powers of the Secretary of the Interior by any ruling or order, other than an actual determination of the mineral char-

acter of the land, to divest the United States of its title.

The order of dismissal of Secretary Fall could not possibly have any effect upon the rights of the parties herein. The only decision which could have affected these rights was an adjudication on the merits of the charges then pending against this section. The case was not before him for consideration upon the merits. If the mineral character had actually been determined by the Department beforehand, then the title was out of the government and the Interior Department had no jurisdiction to hold hearings thereon or to make rulings. The jurisdiction of the Department to determine this question is exhausted when once properly exercised. On the other hand if, in fact, there had been no prior determination by the Department of this question, Secretary Fall's ruling that there had been such a determination could not possibly make it so nor could it alienate the title of the federal government. *Louisiana v. Garfield*, 211 U. S. 70. Unless the title has actually passed from the United States the Department of the Interior still has jurisdiction. Even a course of dealing on the part of the government and the Land Department for fifty years on the theory that title had passed to the state will not estop the government from correcting the mistake and reasserting its claim. *Lee Wilson & Co. v. United States*, 245 U. S. 24. The order of dismissal could neither add to nor dimish the rights of the parties. It left the matter just where it stood before the hearing began.

In coming into court with this bill of complaint

respondent is entering the forum it should have entered in June 1921, instead of appearing before Secretary Fall for the oral hearing. Furthermore, as previously indicated, respondent is settling up in the complaint the identical defenses that were urged before Secretary Fall in June, 1921. Paragraph IV of the complaint alleges that the order of 1904 relieving Section 36 and the other lands from suspension was a determination that the said lands were non-mineral and that the title of California to said section was thereby finally determined and settled. Paragraph V alleges that under the operation of the Rules and Regulations of the Department of March 6th, 1903, and because no mineral had actually been discovered on the lands at that time, the title became vested in the State of California. Paragraph VIII of the complaint sets forth the equitable defenses and Paragraph X alleges that Secretary Fall's decision at the oral hearing on June 8, 1921, was a final adjudication and judgment of this question.

The order of dismissal of June, 1921, was not and could not have been a decision on the merits. The decision of the Court of Appeals of the District of Columbia was based upon obvious misreading of the record. The learned Associate Justice, who wrote the opinion, erroneously assumes that the parties in interest in this case expressly stipulated that taking of testimony in the local Land Office was not necessary on the disputed issues of fact, and he reiterates this statement three times in his opinion (R. 121, 122, 123).

As a matter of fact the record shows that this was the position taken at the hearing before Secretary Fall

by Mr. Sutro, but was disputed by Assistant Secretary Finney of the Interior Department, and because Mr. Sutro considered this question of fact immaterial, it was not discussed at the hearing on June 8, 1921, nor at any prior conferences between Mr. Sutro and Secretary Fall or Assistant Secretary Finney. The record recites, page 72:

> "It was the contention of the transferees from the State, *with which contention Assistant Secretary Finney disagreed at the hearing*, that it could serve no purpose to take evidence in the local land office to determine the question whether or not said section or the lands adjacent thereto showed structural and geological conditions indicative in 1903 of the existence of oil on said section under conditions justifying developments therefor for the reason that said questions presented an immaterial question of fact and said question was not argued or discussed at the proceedings held on June 8, 1921, or at any conferences prior thereto between the representatives of the transferees and the Secretary of the Interior or the First Assistant Secretary of the Interior, except as shown in the brief (Exhibit 5), and in the transcript of proceedings (Exhibit 2, attached to answer)."

IX.

If Secretary Fall Undertook a Decision On the Merits It Was a Void Act

The record shows that Assistant Secretary Finney took the position that the Navy having asked for a hearing as to the mineral character of the land at the date of the survey it was required under the rules of the Department, and the decision of the Supreme Court, that the geological indications, discoveries, and developments upon adjacent lands be taken into consideration to determine this question. The only way in which testimony could be taken on such an issue was before the local land office, as there is no provision either in the rules or the practice for taking testimony before the Secretary. Therefore, if Secretary Fall undertook to decide the case on the merits without giving the Government a chance to present its evidence or to be heard on its contention, he was exceeding and transcending his powers, and any order or ruling made by him under these conditions is absolutely void. It has been repeatedly determined that notice and an opportunity to be heard before being concluded by a judgment is inherent in the conception of due process of law and cannot constitutionally be dispensed with.

McDonald v. Mabee, 243 U. S. 90.

A judgment without adequate notice to or service upon the defendant is wholly void. A defendant must be accorded an opportunity to present his defense

according to the established mode governing the class to which his case belongs, and the court may not transcend in the extent or character of its judgment the law which is applicable to it.

Simon v. Southern Railway, 236 U. S. 115;
Webster v. Reid, 11 Howard 437.

Jurisdiction is held to be the right to hear and determine; not to determine without hearing. Where there can be no hearing or opportunity of being heard, there can be no exercise of jurisdiction, and where the court transcends the limits of its authority, its judgment is absolutely void.

Windsor v. McVeigh, 93 U. S. 274.

The conclusion is unescapable that the trial court erred in holding that the order of dismissal of Secretary Fall was a final judgment exhausting the powers of the department. This could be done only by a hearing and adjudication on the merits. Such an adjudication could not be made under a mode of procedure which prevented the government from putting in any evidence on the disputed questions of fact. If he intended to make such an adjudication, then he deprived the Government of the right to be heard and his decision was a void act. Such a ruling could have no binding force or effect upon the present Secretary of the Interior who would have full authority to review, reverse and vacate the ruling originally made.

Louisiana v. Garfield, 211 U. S. 70.

X.

This Suit Is One Against the United States

This case should be dismissed because it is in reality a suit against the United States which has not consented to be sued.

Since the title to this section has never been alienated from the Government, the United States is a necessary party in this suit. The petitioner is sued in his official capacity as Secretary of the Interior to restrain him from continuing with the discharge of one of the duties imposed by law upon him alone, to-wit, the determination of the mineral or non-mineral character of a section claimed under a school grant. He has no personal or individual interest in the matter but has asserted title to the lands in question in the name of the United States being authorized so to do by a joint resolution of Congress. This action is brought to remove such claims as an alleged cloud upon the respondent's title. This suit can not be maintained in the absence of the United States, its title can not be taken away or impaired "behind its back," nor can it be sued without its consent.

Louisiana v. Garfield, 211 U. S. 70;
Oregon v. Hitchcock, 202 U. S. 60;
Naganab v. Hitchcock, 202 U. S. 473;
New Mexico v. Lane, 243 U. S. 52.

The question whether the United States is a party to a controversy is not determined by the mere nom-

inal party on the record but by the effect of the judgment or decree which can be entered.

Minnesota v. Hitchcock, 185 U. S. 373, 387;
Louisiana v. McAdoo, 234 U. S. 627, 629;
Ex Parte State of New York, 256 U. S. 490, 500.

CONCLUSION

In conclusion we submit that the following points are established in this case: A careful examination of the history of this section shows that the Government since the year 1900 has regarded the question of the mineral character of this land as unsettled and open to determination by the Interior Department. In 1914 the Supreme Court of the United States in *The Southern Pacific* case (*supra*), definitely determined that other lands in this township, including the section immediately adjacent to Section 36, were known mineral in 1904. Charges were immediately filed in the Land Office calling for a determination of the mineral character of this section. Such charges were amended and pending and undisposed of when Mr. Sutro appeared before Secretary Fall in the spring of 1921 and asked to have the proposed contest dismissed because the matter had already been decided by the Department and the case closed. Secretary Fall was not asked to decide the case on the merits but to avoid and evade such a decision as it involved a procedure calling for a useless waste of time and expense. Sec-

retary Fall was persuaded by the argument of Mr. Sutro that it was not necessary to decide this case on the merits and accordingly dismissed the proceedings. He did not and could not adjudicate the merits without giving the Government a chance to present its case and be heard. If Secretary Fall thought the Government was estopped to assert claims to this land by reason of previous course of dealings or alleged equities asserted by appellee then his decision was absolutely void in point of law because the Government title to this land could only be divested by formal determination by the Department of its non-mineral character as of 1903 and such a determination has never been had.

We respectfully submit that the petitioner is wholly within his legal rights in proceeding with the hearing which the Supreme Court of the District of Columbia has enjoined. The courts should not interfere with the discharge by the Secretary of the Interior of his sworn duty and this case should be reversed.

Respectfully submitted,

W. CARR MORROW,

Attorney and Special Counsel for Petitioner.

BRIEF

FOR THE RESPONDENTS

IN

OPPOSITION

FILED

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1927

No. [redacted] 71

HUBERT WORK, Secretary of the Interior,
Petitioner,

vs.

STANDARD OIL COMPANY (a corporation),
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1927

No. 771

HUBERT WORK, Secretary of the Interior,
Petitioner,
vs.
STANDARD OIL COMPANY (a corporation),
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the District of Columbia.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The decree sought to be reviewed enjoins the Secretary of the Interior from hearing an adverse proceeding in his department purporting to affect the title to a school section in Kern County, California. The Supreme Court of the District and the Court of Appeals decided that the adverse proceeding had been heard and decided by the petitioner's predecessor in office, that the previous decision was a final judgment which could not be set aside by the present Secretary, and that it could be attacked only by direct suit in equity brought for that purpose and

based upon sufficient grounds. Both courts further held that the title to the land had passed to the State of California, and was no longer a part of the public domain, so that the present Secretary had no jurisdiction over it.

THE FACTS.

The facts stated by the petitioner, except for a few errors and omissions, are correct. To these errors and omissions we respectfully beg to call attention.

1. While the official survey returned the section as mineral, the mineral return was based on field notes that recited that there were asphaltum exudations in the township which were said to be well known signs of oil. It is admitted in the case that the reference to asphaltum exudations was erroneous; that there was no mineral exposed in the township in 1903, and that the notation as to asphaltum outcroppings referred to exposures in an adjacent township (R. 40).

2. While it is true, as stated in the petition at page 2, that the State of California on March 7, 1903, filed in the local land office in California its offer to surrender this land as a base for an indemnity school land selection on the ground of its mineral character, it is also true that on March 6, 1903, the Department of the Interior at Washington adopted a regulation which prevented a state from surrendering a school section as mineral unless there was an actual discovery of mineral on the land (R. 4, 32 L. D. 39). This offer to surrender was made while the state must still have been in ignorance of this rule, and while the land was still under suspension from agricultural

entry, and while there was still nothing to detract from the force of the surveyors' mineral return. The offer of the state to surrender this section was withdrawn on August 15, 1905. This was after the land had been restored to agricultural entry on April 5, 1904 (R. 16-17), and presumably after the state knew of the rule of the Department that a school section could not be surrendered as mineral without proof of an actual discovery of mineral on the land.

3. When the land was restored to agricultural entry in April, 1904, the order of restoration recited that "no mineral has been discovered" on the land, and "no good reason exists for further suspension" (R. 11. R. 17).

4. In January, 1901, the state sold this section for $1.25 an acre. The purchaser, however, failed to pay the taxes, and in 1902, the section was sold to the state for delinquent taxes, penalties and costs, in the sum of $3.28 (R. 5). In August, 1908, the state again sold the land for $1.25 an acre. In November, 1909, respondent purchased the larger portion of this land from the grantees of the state (R. 5, 6).

5. No notice of the charges filed in January, 1914, was served upon the respondent or upon any one else until 1921 (R. 7, 38).

6. In December, 1916, the transferees from the State tendered this section to the Navy. This offer was rejected by the Navy, on the ground that it was not valuable for oil. At a hearing before the Public Lands Committee of the Senate in 1916, the chief geologists of the Navy testified that this land "was not commercial oil land at all" (R. 39).

7. In 1918, the war demands caused a great shortage of oil and in that year respondent drilled upon this section and discovered oil. This was the first discovery of oil on the section. The first discovery of oil in the entire township or in the Elk Hills structure was in 1911. After the discovery of oil in 1918, the development of the section proceeded rapidly, and a great many wells were drilled thereon (R. 39, 66, 67).

8. All the foregoing matters were shown and stipulated at the hearing before the previous Secretary.

9. After the discovery of oil and the further development of the section and in February, 1921, the Secretary of the Navy and the Secretary of the Interior requested the Department of Justice to take action to protect the interests of the United States and of the Navy in this section. The Department of Justice concluded: (1) That the determination as to the known mineral character of the land was exclusively a matter for the Department of the Interior, and (2) that on account of the possible loss by drainage from the adjoining section, an injunction pending such determination was inadvisable, provided there would be no further development "pending a speedy determination by the Department of the Interior of the question of title" (R. 68).

10. Assurances were "given by the Interior Department that there would be an early hearing and determination of the character of the land" (R. 69), and on May 16, 1921, an agreement was entered into between the transferees and representatives of the Department of Justice and of the Department of the Navy that no action would be taken until a determination by the Department of the

Interior of the known mineral character of the land (R. 69), and upon the further condition that the transferees from the State

> "would immediately endeavor to secure from the Department of the Interior an early hearing and determination with respect to the known mineral character of said Section 36 at the date of the approval of the survey thereof and with respect to the title to said Section 36" (R. 69).

11. Request was made to the Secretary of the Interior for a speedy determination (R. 70), and the request was granted. Written notice was given by the Secretary to the Attorney General, the Secretary of the Navy and to the transferees from the State of a hearing to be held on June 8, 1921, for the purpose of determining "whether or not said section passed to the State of California under its school grant" (R. 89).

12. On page 7 of the petition, in referring to the hearing before the Secretary, it is asserted that no opportunity was offered for the presentation of either testimony or argument on behalf of the Government. The record shows that in addition to the Secretary himself there were five representatives of the Government present. All of these representatives of the Government were familiar with all the facts and four were attorneys especially skilled in land law (R. 70, 71, 72). Two of these attorneys participated in the discussion, and one, Assistant Secretary Finney, urged upon the Secretary that evidence as to geological conditions should be received (R. 47, 48). At this hearing Mr. Sutro in behalf of the claimants to the land, made an oral statement of facts and argued from these facts that whatever the rule might be with regard to railroad grants,

so far as school sections were concerned evidence as to geological conditions was immaterial in view of the rule of the department that a school section could not be surrendered as mineral unless there was an actual discovery of mineral on the land (R. 41, 42, 43). The Secretary's remarks indicate that he agreed with Mr. Sutro that evidence as to geological conditions would be immaterial (R. 46). At the conclusion of the statement, he asked the representatives of the Government if the facts stated by Mr. Sutro were admitted, and upon receiving the reply that these facts were substantially correct he ordered the contest dismissed (R. 49, 72).

13. After these proceedings the representatives of the Department of Justice, present at the hearing, reported to the Assistant Attorney General that the Secretary of the Interior had decided that the lands in said Section 36 were not known mineral at the date of the grant to California, and thereupon the Department of Justice took no further steps in the matter (R. 72-73).

14. The procedure followed in this hearing was in accordance with the practice of the office of the Secretary of the Interior (R. 73).

JUDGMENT OF THE SECRETARY DISMISSING THE CONTEST.

15. On the following day the Secretary of the Interior, through the First Assistant Secretary, rendered his formal and written judgment of dismissal, which recited that "after consideration of the law and facts involved", the Secretary had on the previous day directed that the proceeding be dismissed (R. 20). No petition for rehearing

was ever filed, and the judgment remained unchallenged until May 8, 1925, when the present Secretary, by a written order, attempted to set aside the judgment so rendered by his predecessor, and to again hear and determine the same contest which the former Secretary had heard and determined (R. 21, 24).

ARGUMENT.

I.

THE WRITTEN JUDGMENT OF THE SECRETARY OF JUNE 9, 1921, WAS A FORMAL DECISION OR JUDGMENT.

Ary v. Iddings, 12 L. D. 252;
West v. Hitchcock, 205 U. S. 80;
Coder v. Lotridge, 12 L. D. 643;
John H. Reed, 6 L. D. 563;
Murray v. Polglase, 43 Pac. 505;
Anderson v. Northern Pacific, 7 L. D. 163;
Dahlstrom v. St. Paul, 12 L. D. 59.

II.

THE DECISIONS OF THE SECRETARY ARE JUDICIAL IN CHARACTER.

United States v. Schurz, 102 U. S. 378;
Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496;
Wyoming v. United States, 255 U. S. 489;
Steel v. Smelting Co., 106 U. S. 447;
Payne v. New Mexico, 255 U. S. 367.

III.

THE JUDGMENT OF JUNE 9, 1921, WAS A JUDGMENT ON THE MERITS.

This judgment recites on its face that it was rendered after a "consideration of the law and the facts", thus showing affirmatively on its face that it was a judgment on the merits. However, if the judgment had contained no such recital, the judgment of dismissal would be conclusively presumed to be a judgment on the merits.

Durant v. Essex, 7 Wall. 107;

Lyon v. Perin, 125 U. S. 698;

Armour & Co. v. Ft. Morgan, 270 U. S. 253;

Scott v. First National Bank of Morris, 285 Fed. 832;

Hickey v. Johnson, 9 Fed. (2nd) 498.

Counsel contend that the Secretary rendered the judgment because he was of opinion that the Government was estopped from claiming that the land was known mineral land by reason of the rule of the department with regard to school sections, and by reason of the restoration to agricultural entry in 1904. From this he argues that the judgment was not rendered on the merits, and not being rendered on the merits, the present Secretary can set it aside. Every remark made by the Secretary indicates that his decision was not based on an estoppel (R. 41, 43, 45, 46-49). But if the judgment were based on an estoppel it would still be a judgment on the merits.

Black on Judgments, Sec. 694;

Burk v. Spafford, 35 Me. 526.

IV.

THE JUDGMENT CONCLUSIVELY IMPLIES A FINDING THAT THE LAND WAS NOT KNOWN MINERAL.

Burke v. Southern Pacific, 234 U. S. 669 (p. 691 of opinion);

Smelting Company v. Kemp, 104 U. S. 636;

Buena Vista Petroleum Co. v. Tulare, 67 Fed. 226.

See also:

Fauntleroy v. Lum, 210 U. S. 230;

American Express v. Mullins, 212 U. S. 311.

V.

THE PROCEDURE ADOPTED BY THE SECRETARY OF THE INTERIOR WAS WITHIN HIS JURISDICTION.

The Secretary of the Interior has complete authority over the public lands.

Revised Statutes, Sec. 441;

Johanson v. Washington, 190 U. S. 179.

The procedure adopted by the Secretary of the Interior was in accordance with the practice of the Department (Agreed Statement, R. 73) and provided for by the rules of practice of the Department (Rule 85, Rule 86, R. 90, 91).

Representatives of the Departments of Justice and Navy and the transferees were agreed that the case presented an exigency calling for an immediate decision (R. 67, 68, 69), and the exigency was stated to the Secretary at the oral hearing (R. 46). It was for the Secretary to determine whether the exigency of the case was sufficient

to justify the procedure followed. The Secretary can decide any matter pending in his Department.

Knight v. United States Land Asso., 142 U. S. 161;
Hawley v. Diller, 178 U. S. 476;
Lake Superior Ship Canal Co. v. Patterson, 30 L. D. 160;
Harvey M. La Follette, 26 L. D. 453.

VI.

THE JUDGMENT OF THE SECRETARY WAS A FINAL JUDGMENT THAT TITLE HAD PASSED TO THE STATE AND WAS THE EQUIVALENT OF A PATENT.

Shaw v. Kellogg, 170 U. S. 312;
Lane v. Watts, 234 U. S. 525;
Michigan Land & Lumber Co. v. Rust, 168 U. S. 589;
Chandler v. Calumet & Hecla Mining Co., 149 U. S. 79;
Noble v. Union River Logging R. R., 147 U. S. 165;
Del Pozo v. Wilson Cypress Co., 269 U. S. 82.

In each case the question as to whether or not the title has become vested is: "Is there any further action to be taken?" And it has been uniformly held that if there is no further action for the Department to take, the final action, whatever it may be, operates as a patent and either passes the title or confirms it.

United States v. Schurz, 102 U. S. 378;
Bockfinger v. Foster, 190 U. S. 116;
Ernest B. Gates, 41 L. D. 384.

In the case of *United States v. Schurz*, 102 U. S. 378, the court said:

> "It is equally clear that this period is at the latest, precisely when the last act in the series, essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government, or to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away."

So, in this case, there was nothing further for the Interior Department to do. There was no provision for the issuance of a patent. There was no provision for any approval of any list. In fact, there was no provision for the doing of any further act in connection with the title. The grant was a grant *in praesenti*. The title passed to the State, unless the land was known mineral land at the date of the approval of the survey. The United States filed a formal proceeding to have it determined that the title to the State had not passed. That proceeding came on for hearing before the tribunal having jurisdiction to hear it. The hearing was held and judgment was rendered that the title had passed from the United States and that the State's title had vested. There was no other act that the Department could take; there was no further paper for it to sign; there was no entry to be made; there was nothing further of any kind or character to be done. The last act in the transmission of the title to the State had been performed, and under the authorities cited, the title had passed to the State.

VII.

THE JUDGMENT OF THE SECRETARY IS IMPERVIOUS AGAINST COLLATERAL ATTACK ON ANY GROUND EXCEPT THAT IT IS ABSOLUTELY VOID.

Although the judgment recited that it was rendered after consideration of the law and facts involved, and although the Secretary had before him the records of the Department and facts which were agreed to be correct and physical evidence with respect to the land, petitioner claims that the transcript of the proceedings before the Secretary should be inspected in order to determine whether the judgment rendered was rendered on the merits.

If the transcript of the proceedings be examined, it shows conclusively that the Secretary did intend to and did render a judgment on the merits. Both the transferees from the State and the representatives of the Government were seeking a judgment on the merits (R. 69), and the notice of the hearing which the Secretary sent out, stated that the hearing was to determine whether or not the section had passed to the State of California under its school grant (R. 89).

At the hearing the principal discussion was whether or not under the admitted facts the land was known mineral land, and every remark the Secretary made indicated that it was that question that he was considering (R. 43, 49).

But as a matter of fact, the transcript cannot be inspected to impeach the judgment.

Franklin County v. German Savings Bank, 142 U. S. 93;

Freeman on Judgments, Secs. 304, 305.

And even the remarks of a Judge or his opinion cannot be looked to to destroy the effect of a judgment.

Baxter v. Buchholz-Hill Co., 227 U. S. 637;
Martin v. Evans, 85 Md. 8; 36 Atl. 258.

And this principle applies to judgments of the Secretary of the Interior.

Smelting Co. v. Kemp, 104 U. S. 636;
West v. Hitchcock, 205 U. S. 80;
De Cambra v. Rogers, 189 U. S. 119.

It is argued that the judgment of the Secretary was erroneous, and that his decision should not have been rendered on the basis of the rules of the Department to the effect that in the case of school land the title passes, in the absence of a showing of mineral on the land. But the judgment is not subject to collateral attack on account of such error, if error it was.

Franklin County v. German Savings Bank, 142 U. S. 93;
Smelting Co. v. Kemp, 104 U. S. 636;
United States v. Schurz, 102 U. S. 378;
Noble v. Union River Logging R. R., 147 U. S. 165;
Burke v. Southern Pacific, 234 U. S. 669.

The only method of attacking such a judgment is by a direct judicial proceeding to set the judgment aside.

Knight v. United States Land Asso., 142 U. S. 161;
Noble v. Union River Logging R. R., 147 U. S. 165;
Burke v. Southern Pacific, 234 U. S. 669.

In this latter case, this court said, with reference to a patent issued without any investigation whatever as to the character of the land:

"A patent issued in such circumstances is irregularly issued, undoubtedly so, but as it is the act of a legally constituted tribunal and is done within its jurisdiction, it is not void and therefore passes the title (Noble v. Union River Logging R. R., 147 U. S. 165, 174, 175), subject to the right of the government to attack the patent by a direct suit for its annulment if the land was known to be mineral when the patent issued."

VIII.

THE PRESENT SECRETARY CANNOT SET ASIDE THE ORDER OF HIS PREDECESSOR AND CAN BE ENJOINED FROM ACTING BECAUSE HE HAS NO JURISDICTION OVER THE LAND. THIS ACTION IS NOT AGAINST THE UNITED STATES BUT AGAINST THE SECRETARY, TO PREVENT HIM FROM ACTING WHERE HE HAD NO JURISDICTION.

Moore v. Robbins, 96 U. S. 530;

Lane v. Watts, 234 U. S. 525;

Noble v. Union River Logging R. R., 147 U. S. 165;

United States v. Schurz, 102 U. S. 378.

IX.

THE VARIOUS WITHDRAWALS CANNOT AFFECT THE RIGHTS OF THE TRANSFEREES FROM THE STATE.

All the withdrawals shown by the record were made long after the State's rights became vested and even after the State had sold the land. The withdrawals, therefore, are of no importance in this case.

Payne v. Central Pacific Ry., 255 U. S. 228.

X.

STATEMENTS OF THE COURT OF APPEALS RELIED UPON BY PETITIONER.

The main argument of the petitioner is that the Court of Appeals erred in stating that it was agreed by the parties that it was not necessary to go into the question of geological evidence. We submit that this presents no question of law and no one of the recognized grounds for the granting of a writ of certiorari. But, as a matter of fact, the opinion of the Court of Appeals points out that Mr. Finney, First Assistant Secretary of the Interior, did not join in this agreement. (R. 121.)

The substance of the matter is that before the hearing all of the representatives of the Departments understood the contention of the transferees from the State in this respect. (R. 72.) Assistant Attorney General Riter wrote a letter to a Special Assistant Attorney General in which he called this Mr. Sutro's main contention. (R. 78.) They all understood that if this contention were correct, the matter could be determined without the taking of evidence in the local Land Office in California and the delay of a long hearing in the local Land Office and of the ensuing steps; they all wanted a speedy determination. (R. 68, 69.) They all understood that such determination would be sought by the transferees from the State from the Secretary of the Interior, and they all responded to the notice of the hearing which was sent out by the Secretary and participated in the hearing without protest. (R. 69, 37.)

The statement of the Court of Appeals to which petitioner takes exception is in substance correct. An inspection of that opinion, however, discloses that the Court of

Appeals supported the jurisdiction of the Secretary of the Interior not by the agreement referred to, but upon the authority of the decision of this court in *Knight v. United States Land Association*, 142 U. S. 161, from which the Court of Appeals quoted at length, and upon which the Court of Appeals based its approval of the decision of the trial court that the Secretary of the Interior had authority and jurisdiction to proceed as he did.

It is obvious that under the decision in *Knight v. United States Land Association* the decree sustaining the jurisdiction of the previous Secretary over the proceedings is correct, and the discussion of whether or not the Court of Appeals correctly or incorrectly read the record as to the agreement of the parties in respect to what the Secretary could do presents a false issue.

The Secretary having jurisdiction to decide the case, decided it. His judgment cannot be upset because the attorney presenting the case may have made a faulty argument or even if the Secretary himself had erroneously excluded certain evidence, or had come to a wrong decision. The only method of setting the judgment aside is by a direct attack against the judgment itself. Up to the present time, the United States has not seen fit to make such attack. The proper law officers of the Government have taken no action to set it aside. This petitioner, on his own motion, attempts to set aside the judgment of his predecessor and to again hear and to again determine the very case which his predecessor has already heard and determined. This he cannot do. No suggestion of fraud is made in this case, but petitioner's contention is based chiefly on the alleged erroneous conclusion of

the Court of Appeals as to a matter of fact with respect to the agreement of the parties as to what the Secretary of the Interior should hear and determine. A judgment of a Court of Appeals

> "which turns on a matter of fact of no general importance depending on an appreciation of circumstances admitting of different interpretations will not be reviewed by certiorari".

Federal Trade Commission v. American Tobacco Co., 274 U. S. 543;

Layne, etc. Co. v. Western Well Works, 261 U. S. 387, 393;

Lau Ow Bew, Petitioner, 141 U. S. 583;

Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 508;

In re Woods, 143 U. S. 202;

Boldt v. Pennsylvania Ry. Co., 245 U. S. 440.

We respectfully submit that the petition should be denied.

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RESPONDENT'S

BRIEF

Office Supreme Court
FILED
OCT 15 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 71.

ROY O. WEST, Secretary of the Interior, *Petitioner*,

vs.

STANDARD OIL COMPANY, (a corporation), *Respondent*.

BRIEF FOR RESPONDENT.

OSCAR SUTRO,
McKENNEY & FLANNERY,
LOUIS TITUS,
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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ROY O. WEST, Secretary of the Interior, *Petitioner*,

vs.

STANDARD OIL COMPANY, (a corporation), *Respondent*.

BRIEF FOR RESPONDENT.

The above-entitled case is before this court on a writ of certiorari, to review a judgment of the Court of Appeals of the District of Columbia, affirming a judgment of the Supreme Court of the District, enjoining the petitioner, as Secretary of the Interior, from proceeding with a contest in his department purporting to affect the title to a certain Section 36, a school section, in Kern County, California.

OPINIONS OF THE COURTS BELOW.

The official report of the opinion of the Court of Appeals is found in 57 Appeal Cases, D. C., 329; also in 23 Fed. (2d) 750. The opinion is also set forth in

NOTE:—Italics ours wherever used in this brief.

the record, page 119. The opinion of the Supreme Court of the District is found in the record, page 95.

STATEMENT OF THE CASE.

On March 3, 1853, Congress granted to the State of California the sixteenth and thirty-sixth sections in each township for school purposes (10 Stats. L. 244). The grant did not include land known to be mineral at the date of the approval of the survey in cases where the survey was made after the date of the grant. *Mining Co. v. Consolidated Mining Co.*, 102 U. S. 167; *Wyoming v. United States*, 255 U. S. 489, see p. 500.

The portion of the township containing the section 36 in controversy, was surveyed in 1901 and 1902, and the survey was approved by the Department on January 26, 1903 (R. 66). The title to this section, therefore, vested in the state of California on January 26, 1903, unless on that date the land was known mineral land.

In 1914 a contest or adverse proceeding concerning this section was instituted in the Department of the Interior on behalf of the United States against the State of California and its transferees (R. 7). The contest as amended charged that the title of the State and its transferees to Section 36 was invalid because the land was known mineral land at the date of the approval of the survey (R. 77). The contest lay dormant until 1921, when it was revived and a hearing had thereon on June 8th of that year. At the close of the hearing the then Secretary of the Interior orally ordered the contest dismissed. The next day, on June 9th, the formal written judgment of the Depart-

ment was rendered dismissing the contest and closing the case on the records (R. 20).

Approximately four years later, on May 8, 1925, a succeeding Secretary attempted to reverse and set aside this formal judgment of his predecessor and thereafter attempted to proceed with a hearing on the charges contained in the adverse proceeding (R. 21, 25). Thereupon the complaint in this section was filed, praying for an injunction enjoining the Secretary from continuing with the proceedings directed by him. Upon the final hearing of the case upon the merits, the Supreme Court of the District of Columbia entered a judgment granting the injunction as prayed upon the ground that the decision by the former Secretary was a judgment on the merits that the title to the land had vested in the state, that the present Secretary had no jurisdiction over the land and no authority to set aside the judgment of his predecessor, and that any attempt on his part to hold hearings or make orders with reference to the land could have no effect except to cloud the title, against which clouding of title an injunction should properly issue. That judgment of the Supreme Court was affirmed by the Court of Appeals of the District, and it is this judgment of the Court of Appeals, review of which is now to be had.

THE QUESTIONS INVOLVED.

The case involves the question whether the present Secretary of the Interior has jurisdiction to again try and to again decide the same adverse proceedings affecting this section, which a former Secretary has already tried and has already decided. The petitioner challenges the decision of the former Secretary on two grounds: First, that it was not on the merits; second,

that if it were on the merits, nevertheless it is void because the Secretary erroneously refused to consider certain evidence as to geological conditions.

There are thus two questions involved:

> (1) Was the judgment of the former Secretary a judgment on the merits?
>
> (2) If it was a judgment on the merits, is it void because the Secretary failed to consider certain evidence alleged to have been material?

At the outset, it should be noted that this is not an action to set aside the judgment of the former Secretary upon the ground that such judgment was procured by fraud or by mistake or upon any other ground. The United States has brought no such action. But this petitioner, the present Secretary, attempts on his own authority to set aside or to ignore the judgment of his predecessor and again to hear and decide the very contest which has once been heard and decided. This we submit he cannot do.

Counsel for petitioner apparently concede that if the judgment of the former Secretary were on the merits and not void by reason of the alleged error in respect to the reception of evidence, then the judgment of the court below should be affirmed.

FACTS.

Respondent deems the statement of facts set out in petitioner's brief entirely inadequate for a proper understanding of the questions involved. We, therefore, set out the essential facts involved in the case. *The case is before the court on an agreed statement of facts* (R. 66-75).

Survey and Approval of Plat.

That portion of the township containing Section 36 was surveyed in 1901 and 1902. The plat of survey was approved by the Commissioner of the General Land Office, January 26, 1903 (R. 66). While the official survey returned the land as mineral (R. 66), the mineral return was based on field notes which recited that there were extensive asphaltum exudations in the township (R. 40). This recital was an error, as is shown by the agreed statement of facts to the effect that no mineral was exposed in this township or oil discovered therein prior to 1910 (R. 66). The erroneous recital appears to have been based on a confusion of this township with another township, which did contain well known asphaltum exudations (R. 40).

Suspension From and Restoration to Agricultural Entry.

In 1900 this township, together with forty others, was suspended from agricultural entry pending examination as to the mineral or non-mineral character thereof (R. 11). On April 5, 1904, the Commissioner of the Land Office relieved the entire township from suspension and restored the same to agricultural entry on the ground that

> "no mineral has been discovered" and "no good reason exists for further suspension" (R. 17).

State's Offer to Surrender Section and Withdrawal of That Offer.

On March 7, 1903, the State of California applied for a lieu land section in another part of the State and tendered the section in controversy as a mineral

base. On August 15, 1905, the State withdrew the tender and offered another section 36 as a base for the lieu section. It will be observed that the offer to surrender the section in question was made at a time when the land was withdrawn from agricultural entry and while there was nothing to detract from the force of the surveyor's mineral return, and that the withdrawal of the offer was made after the restoration of the land to agricultural entry by an order of the Commissioner reciting that no mineral had been discovered thereon and after the Department had promulgated the rule that a school section could not be used as a base for lieu land because of its alleged mineral character in the absence of proof of the exposure of mineral on the land. (R. 32.)

Regulation of the Department that School Sections Could Not Be Surrendered as Mineral Without Actual Discovery of Mineral on the Land.

On March 6, 1903, the Department published rules and regulations (32 L. D. 39) (subsequently re-promulgated on the point here at issue, 34 L. D. 365,369) which provided that a school section could not be used as a mineral base for lieu land and surrendered for that purpose "whether returned by the Surveyor General as mineral or otherwise" without proof that the land "was chiefly valuable for mineral" and without proof "of the kind of mineral discovered on the land and the extent thereof, when and by whom the discoveries were made" etc. etc. and that without such proof a lieu selection "would not be permitted." (R. 4.)

That proof could not have been made in 1903. The agreed statement of facts shows that prior to 1919 there was no discovery of mineral on the land and

prior to 1910 none in the entire township. In 1903 no mineral was known to exist within a radius of many miles of the section.

Obviously this regulation issued in Washington on March 6, 1903, could not have been known in California on March 7, 1903, when the tender of this section was made. But the regulation undoubtedly was known in 1905 when the tender of the section was withdrawn and coupled with the Commissioner's restoration of the land to agricultural entry and his finding that there was no mineral in the township undoubtedly caused the State to abandon the attempt to use the section as a mineral base.

Sales by the State.

On January 3, 1901, Alice J. Miller contracted to purchase this land from the State of California at $1.25 per acre, and made her initial payment of $160. She failed to make further payments and also failed in the payment of interest and taxes. On July 2, 1902, her interest in the section was sold to the State for delinquent taxes, penalties and costs in the sum of $3.28 (R. 5, 74). On August 25, 1908, George Hay and M. W. Buffington redeemed the land from the previous tax sale and contracted to purchase the entire section at $1.25 per acre, and in due course the State of California issued its patent for this land. In November, 1909, a portion of the section was sold to the respondent by the purchaser from the State at $22 per acre. At approximately the same time another portion was sold to one F. J. Carman for $20 per acre (R. 5, 6, 74).

Withdrawals and Establishment of Naval Reserve.

Beginning September 18, 1908, there were various recommendations for and subsequently withdrawals of this land by the Department. Finally by executive order dated September 2, 1912, Naval Reserve No. 1, including this section, was established by President Taft, "subject to valid existing rights." (R. 91, 95.)

Adverse Proceedings Begun.

On January 14, 1914, adverse proceedings were initiated in the General Land Office on behalf of the United States, contesting the title of the State of California and its transferees to this section. This contest as amended charged that the land was known to be mineral at the date of the approval of the survey, (R. 35, 77). No notice of the contest was given to anyone (R. 38), and apparently no attention was ever paid to it until 1921 except that in 1917 the attention of the Commissioner of the General Land Office was drawn to its pendency (R. 7). No one outside of the Land Office appears to have known anything about it (R. 38).

Section Offered to Navy in 1916 and Rejected As Not Oil Land.

In December 1916 this section was tendered to the Navy Department. The land was then in the same barren condition in which it had been from the time of the grant in 1853. The tender was rejected by the Navy Department and the land condemned as worthless for mineral purposes (R. 81, 39). The matter was discussed in hearings before the Senate Committee on Public Lands in 1916 and various officials of the Navy

testified that the offer of the land was declined because of its uselessness for mineral purposes, the Chief Geologist of the Navy testifying that "it was not commercial oil land at all." It was urged before the Secretary in 1921 that school land not known to be mineral in 1916 was surely not known to be mineral in 1903 (R. 39, 80, 81).

Oil Discovered on Section in 1919.

In 1918, a severe shortage in crude oil, owing to war demands, lead to an intensive search for oil, (R. 39). In that year plaintiff commenced drilling on this section and in January, 1919, discovered oil (R. 6). In May, 1919, plaintiff paid $100,000 for a drilling contract on shares for that portion of the land belonging to F. J. Carman (R. 6, 73). Thereafter the development of the section proceeded rapidly, many wells being drilled and large quantities of oil produced (R. 6, 7).

Assessment of the Land by State.

The land had been assessed by the state prior to 1912 at from $1 to $2 an acre; from 1912-1918 at $25 an acre; in 1919 at $250 an acre. The state assessed the land in 1920 at $1500 an acre and from 1921 to 1924 at an average valuation in excess of $4,000 an acre. Prior to 1926, $333,372.64 was paid to the state in taxes on this section, of which sum plaintiff and its predecessors in interest paid $328,003.39 between the years 1910 and 1925 (R. 73).

Secretaries of the Navy and Interior Request Attorney General to Take Action Protecting Government's Interest.

On February 28, 1921, after large quantities of oil had been developed on the section, the Secretary of the Navy requested the Department of Justice to take action to protect the interests of the United States and of the Navy in said section. On March 2, 1921, the Secretary of the Interior requested the Attorney General to take action to protect the Government's interest (R. 67).

Department of Justice Defers Proceedings Pending Determination of Title by Interior Department.

The Department of Justice concluded that it could do nothing except to institute proceedings for the appointment of a receiver and for an injunction against further operation pending the determination of title by the Department of the Interior (R. 68), but that such proceedings were inadvisable if the operators would agree to suspend further development,

> "pending the speedy determination by the Department of the Interior of the question of title" (R. 68).

Commander Stuart of the Navy, in charge of Naval Reserves, agreed with this conclusion,

> "in view of the fact that assurances had been given by the Interior Department that there would be an early hearing to determine the character of the lands" (R. 69).

Agreement Reached Between Claimants to Land and Departments of Justice and Navy.

On May 16, 1921, an agreement was entered into between the representatives of the transferees of the State and representatives of the Departments of Justice and of the Navy, whereby the transferees agreed to refrain from further drilling said land,

> "upon the understanding that a speedy determination would be had in the Department of the Interior with respect to the title to said Section 36" (R. 69).

It was also agreed that the Department of Justice would take no action,

> "until a determination by the Department of the Interior as to the known mineral character of said lands" (R. 69).

It was further agreed that the transferees from the State of California,

> "would immediately endeavor to secure from the Department of the Interior an early hearing and determination with respect to the known mineral character of the said Section 36 at the date of the approval of the survey thereof and with respect to the title to said Section 36" (R. 69).

Transferees Request Department of Interior to Determine Title to Land.

In pursuance of the foregoing agreement, the transferees presented to the Secretary of the Interior "their request for a determination with respect to the title to said section." The matter was argued before the

Secretary of the Interior and the First Assistant Secretary on May 25, 1921, (R. 70) and a brief accompanied by a map showing the state of development of the surrounding territory was filed with the Secretary on May 26th (R. 70).

Secretary Gives Notice to All Departments Interested of Hearing to Determine Title.

On May 28, 1921, the Secretary of the Interior gave written notice to the Attorney General and to the Secretary of the Navy that a hearing would be held on June 8th to determine whether or not said section passed to the State of California under its school grant. The notice to each Department was substantially the same. The one sent to the Attorney General by the administrative assistant to the Secretary notified the Attorney General that,

> "owners of land in section 36, naval reserve No. 1, California, have asked to be heard orally in the matter of proposed proceeding by the Government *to determine whether or not said section passed to the state of California under its school grant*. Secretary Fall has agreed to hear them at two p. m., Wednesday, June 8, 1921, and will be glad to have representatives of the Department of Justice present at that time if you so desire." (R. 89.)

Hearing Was Held Pursuant to Notice and All Departments Represented.

The hearing was held in pursuance of the notice and there were present the Secretary of the Interior; the First Assistant Secretary of the Interior; C. D. Hamel, an attorney appearing for the United States

Land Office; D .D. Caldwell, Special Assistant Attorney General; Commander H. A. Stuart of the Navy, and Harry L. Underwood, special assistant to the Attorney General. All of the transferees from the state were represented at the hearing (R. 71).

Government Representatives Thoroughly Informed On All Questions Involved.

The agreed statement of facts shows that all of the representatives of the government were fully and specially informed with respect to the subject-matter under discussion and were thoroughly familiar with all questions of fact and of law involved in a determination of the title to Section 36, and were fully familiar with the contentions of the Land Office and of the transferees with respect to said adverse proceedings. They were also familiar with the records of the Department and the practice in such proceedings (R. 70, 71).

All the matters presented at the hearing and in the brief, which had previously been filed with the Secretary of the Interior on May 26th, were known to the representatives of the Department of Justice and the Navy Department and of the Land Office and to the Secretary of the Interior and to the First Assistant Secretary of the Interior prior to the date of said hearing (R. 72).

Statement of Facts and Argument Made by Mr. Sutro, Representing Transferees.

At the hearing, Mr. Sutro, representative of the transferees from the State of California, made a statement of facts and an argument. These presented no material fact not disclosed by the records of the De-

partment, except the date when the Standard Oil Company bought the section from the State of California or its transferees (R. 72).

Facts Stated at Hearing Admitted to be Correct.

At the conclusion of the hearing the Secretary asked Mr. Finney and the other representatives of the government whether the facts stated by Mr. Sutro were admitted, and received the reply that the facts stated were substantially correct (R. 72).

Decision of Secretary.

Thereupon the Secretary orally directed that the contest be dismissed. On the following day the formal decision of the Secretary was rendered in writing. The decision was written by the First Assistant Secretary of the Interior upon the direction of the Secretary of the Interior (R. 72).

That decision is as follows:

> "Department of the Interior,
> Washington, June 9, 1921.
> Received Jun. 9, 1921, G. L. O.
> Address only the Secretary of the Interior.
> The Commissioner of the General Land Office.
>
> Dear Mr. Commissioner: In 1914 proceedings were directed by your office against the state of California and its transferees as to secs. 16 and 36, T. 30 S., R. 23 E., M. D. M. No further action appears to have been taken in the matter until the latter part of 1920, when, it having been called to the attention of the Commissioner of the General Land Office, direction was given that the proceedings be revived and appropriate action taken.
>
> The transferees of the State of California, representatives of the Department of Justice and of

the Navy Department appeared before Secretary Fall on June 8, 1921, and presented the matter orally, whereupon, *after consideration of the law and facts involved*, the Secretary verbally directed that the proceedings be dismissed. You are therefore authorized and directed to dismiss the proceedings against the State of California and its transferees in re said secs. 16 and 36. Notify all parties in interest of the dismissal and close the case upon your records.

By direction of the Secretary.

Respectfully,

E. C. FINNEY,
First Assistant Secretary" (R. 20).

The decision was promulgated by the Commissioner of the General Land Office on June 13, 1921 (R. 72, 20).

Understanding of Effect of Decision by Representatives of Department of Justice.

After the hearing, Messrs. Caldwell, Underwood and Hamel made their report to Assistant Attorney General Riter, and Mr. Riter understood from this report that the Secretary of the Interior had decided that the lands in Section 36 were not known mineral lands at the date that the grant to California became effective. Thereupon the Department of Justice took no further steps in the matter (R. 72, 73).

Proceedings Before Secretary in Accordance with Practice.

The procedure at the hearing before the Secretary was in accordance with the customary practice (R. 73).

No Rehearing Asked and No Further Action Until Present Secretary Undertook to Set Aside Decision of His Predecessor.

No petition for rehearing of said decision was ever filed and no further action of any kind with reference to said decision was taken by the Department of the Interior until May 8, 1925, when the present Secretary of the Interior, the petitioner here, purported to set aside the decision of his predecessor and directed a new hearing upon the same contest for the purpose of again determining the character of the land (R. 73). It was to enjoin such hearing that the present action was commenced, resulting in a judgment granting the injunction as prayed. That judgment was affirmed by the Court of Appeals and it is this judgment of the Court of Appeals that is now under review.

SUMMARY OF ARGUMENT.

1. The title to this land passed to the State of California if the land was not known mineral land at the date of the approval of the survey.

2. The Interior Department had jurisdiction in the first instance to determine the character of the land at the date of the approval of the survey.

3. The question whether the land was known mineral land under the terms of the grant was put in issue by a written contest or adverse proceeding filed in the usual manner in the Department of the Interior and the sole purpose of the contest was to determine that issue.

4. The contest was heard by the Secretary of the Interior who, after hearing, rendered a formal judgment dismissing the contest. The judgment recited that the contest was dismissed "after consideration of the law and facts."

5. The judgment of the Secretary was judicial in character.

6. The judgment rendered by the Secretary of the Interior was a judgment on the merits and conclusively implied a finding that the land was not known mineral land at the date of the approval of the survey.

7. Neither the transcript of the hearing before the Secretary nor the steps preliminary thereto can be examined for the purpose of impeaching the judgment as a judgment on the merits.

8. If the preliminary steps leading to the hearing and the transcript of the hearing are examined they disclose that the judgment was a judgment on the merits at a hearing held for the purpose of deciding the merits.

9. The judgment cannot be impeached because the Secretary excluded evidence which the petitioner claims was material.

10. This is not a direct proceeding to set aside the judgment of the Secretary. It is an action in which the respondent asks for certain relief, and sets up this judgment as the basis for that relief. Petitioner seeks to overcome the force of this judgment by asserting its invalidity. This is a collateral attack. This judgment, rendered by the tribunal having jurisdiction, is not subject to such collateral attack.

11. The Secretary had jurisdiction to hear the contest without previous trial in the Land Office and the hearing followed the rules of practice.

12. Withdrawals subsequent to the date of the approval of the survey could not affect the state's title to the land.

13. The judgment of the Secretary was equivalent to a patent.

14. After the judicial determination that title had passed to the state the land was no longer part of the public domain and the present Secretary has no jurisdiction over it. His attempt to exercise jurisdiction with respect to the land may be enjoined. Such a suit is not a suit against the United States.

ARGUMENT.

I.

THE GRANT BY CONGRESS TO THE STATE OF CALIFORNIA OF THE 16th AND 36th SECTIONS INCLUDED ALL LANDS NOT KNOWN TO BE MINERAL AT THE DATE OF THE GRANT OR AT THE DATE OF THE APPROVAL OF THE SURVEY IF THE SURVEY WERE NOT APPROVED UNTIL AFTER THE DATE OF THE GRANT.

Mining Co. v. Consolidated Mining Co., 102 U. S. 167;
Wyoming v. United States, 255 U. S. 489.

II.

IN THIS CASE THE SURVEY WAS APPROVED AFTER THE GRANT. THEREFORE, THE TITLE DEPENDED UPON THE CHARACTER OF THE LAND AS KNOWN AT THE DATE OF THE APPROVAL OF THE SURVEY. IF AT THAT DATE THE LAND WERE NOT KNOWN TO BE MINERAL THE TITLE PASSED TO THE STATE. A SUBSEQUENT DISCOVERY OF MINERAL COULD NOT AFFECT THE TITLE.

Wyoming v. United States, 255 U. S. 489.

III.

THE INTERIOR DEPARTMENT HAS JURISDICTION IN THE FIRST INSTANCE TO DETERMINE WHETHER OR NOT THE LAND IS OF SUCH CHARACTER AS TO COME WITHIN THE TERMS OF THE GRANT.

Burke v. Southern Pacific, 234 U. S. 669, Page 686 of opinion.

IV.

THE CONTEST FILED IN THIS CASE FOLLOWED THE USUAL PROCEDURE AND RAISED THE SOLE ISSUE WHETHER OR NOT THE LAND WAS KNOWN MINERAL LAND AT THE DATE OF APPROVAL OF THE SURVEY I. E., JANUARY 26, 1903, AND WHETHER OR NOT THE TITLE THEREFORE HAD PASSED TO THE STATE.

In disputing the State's title to land under the terms of the grant, the method followed by the Department of the Interior is to file in the Department on behalf of the United States a contest (sometimes called adverse proceedings), alleging that the claimant's title to the land is invalid for the reason particularly set forth in the contest. A notice of this contest is served on the claimants to the land and the notice contains a warning that unless the charges are answered within a certain time or if the claimant fail to appear the claim to the land will be cancelled. The form of such notice is found at pages 24 and 25 of the record where the notice concerning the title to Section 36 is set forth.

This contest in this case, filed on behalf of the United States on January 14, 1914, followed the usual practice and charged, after amendment, that the title of the state and its transferees was invalid for the reason that the land was known mineral land at the date of the approval of the survey (R. 24, 25, 35, 36). This was in effect a proceeding by the United States, filed with the tribunal having jurisdiction thereof, to cancel the claimed title of the state and its transferees on the sole ground that the land was known mineral land at the date of the approval of the survey.

The sole purpose of this contest was to procure a judgment of the Department determining whether or not the land was of a character covered by the grant and whether, therefore, the title had passed to the State, or whether the land was still part of the public domain. That it is the validity of the claim that is the ultimate matter put at issue by the adverse proceedings is shown by the form of the notice. The notice in this case contains the following statement:

> "You are hereby notified that the following charges have been filed by a representative of the General Land Office *against the validity of your entry*" (R. 24, 25).

At the end of the notice is the warning that unless the charges are answered,

> "Your said above entry or claim will be reported to the Commissioner of the General Land Office for rejection or cancellation" (R. 25).

It is, therefore, the validity of the claim that is the ultimate matter put at issue by the adverse proceedings.

Cameron v. United States, 252 U. S. 450.

In this case the court said at the top of page 460:

> "The Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that *valid claims may be recognized, invalid ones eliminated*, and the rights of the public preserved."
>
> *Payne v. New Mexico*, 255 U. S. 367 (p. 371):
>
> "The power conferred is 'judicial in its nature' and not only involves the authority but implies the duty 'to determine the *lawfulness* of the selections.'"

See, also, *Weyerhaeuser v. Hoyt*, 219 U. S. 380, where it was decided that whether the selection was *valid* or *otherwise* was primarily a question for the Secretary of the Interior to determine.

In *United States v. Winona*, 67 Fed. 948, the Circuit Court of Appeals said at page 956:

> "In every case *the ultimate question is whether or not the facts proved show that the claimant is entitled to the land* under the acts of Congress."

So in this contest concerning Section 36, the ultimate question which was to be determined was whether the title of the state and its transferees was valid or whether the land still belonged to the United States.

V.

THE CONTEST OVER THIS SECTION 36 WAS FORMALLY DECIDED BY THE SECRETARY. THAT DECISION IS THE LETTER OF JUNE 9, 1921. IT IS IN THE ORDINARY FORM OF JUDGMENTS RENDERED BY THE DEPARTMENT. SUCH DECISIONS OF THE SECRETARY ARE JUDICIAL IN CHARACTER.

The contest over this section had been filed on behalf of the Government on January 14, 1914. It came on for hearing before the Secretary on June 8, 1921. After the hearing the formal written decision of the Secretary was rendered. The decision is in the form of a letter dated June 9, 1921. (R. 20.) This is the usual and customary form used by the Department in rendering its judgments.

Ary v. Iddings, 12 L. D. 252;
Coder v. Lotridge, 12 L. D. 643;
John H. Reed, 6 L. D. 563;
Anderson v. Northern Pacific, 7 L. D. 163;
Dahlstrom v. St. Paul, 12 L. D. 59;
West v. Hitchcock, 205 U. S. 80, where a letter of the Secretary was referred to by the Court as the Secretary's decision.

Such decisions of the Secretary are judicial in character, partaking of the nature of judgments.

United States v. Schurz, 102 U. S. 378;
Wisconsin Central Railroad Co. v. Price County, 133 U. S. 496;
Wyoming v. United States, 255 U. S. 489;
United States v. Winona, 67 Fed. 948;
New Dunderberg Mining Co. v. Old, 79 Fed. 598;
Steel v. Smelting Co., 106 U. S. 447;

Ellifson v. Phillips, 18 L. D. 299;
Payne v. New Mexico, 255 U. S. 367, see p. 371 of opinion.

VI.

THE JUDGMENT OF THE SECRETARY OF JUNE 9, 1921, WAS A JUDGMENT ON THE MERITS AND THE JUDGMENT SO SHOWS ON ITS FACE.

The judgment rendered by the Secretary recites that the contest was dismissed after a "consideration of the law and the facts." (R. 20.) Thus the judgment shows affirmatively on its face that it was a judgment on the merits. But even had the judgment not contained the foregoing recital, but had been merely a general dismissal without qualifying words, it would still be presumed to have been a judgment on the merits.

Durant v. Essex, 7 Wall. 107;
Lyon v. Perin, 125 U. S. 698;
Armour & Co. vs. Morgan, 270 U. S. 253;
House v. Mullen, 22 Wall. 42;
Scott v. First National Bank of Morris, 285 Fed. 832;
Hickey v. Johnson, 9 Fed. (2d) 498;
Ledbetter v. Wesley, 23 Fed. (2d) 81.

VII.

THE JUDGMENT CONCLUSIVELY IMPLIES A FINDING THAT THE LAND WAS NOT KNOWN MINERAL LAND AT THE DATE OF THE APPROVAL OF THE SURVEY.

In this contest, the United States had rested its right to a judgment cancelling the State's title upon

the single allegation that the land was known mineral land at the date of the approval of the survey. Therefore, the judgment dismissing the contest on the merits conclusively implied a finding that the land was not known mineral land at the date of the approval of the survey.

Fauntleroy v. Lum, 210 U. S. 230;
Last Chance Mining Co. vs. Tyler, 157 U. S. 683;
American Express Co. v. Mullins, 212 U. S. 311.

Later on in this brief (infra Par. XVI), we show that this judgment of the Secretary was equivalent to the issuance of a patent. This court has repeatedly held that the issuance of a patent by the Department, under a law providing for the issuance of a patent but excluding mineral land, implies a finding that the land was not mineral.

Smelting Co. v. Kemp, 104 U. S. 636;
Chandler v. Calumet & Hecla Mining Co., 149 U. S. 79, see page 92;
Burke v. Southern Pacific, 234 U. S. 669, see pp. 691, 693.

In the case of *Buena Vista Petroleum Co. v. Tulare*, 67 Fed. 226, the Court held that a mere listing to the State of Nevada under a grant excluding mineral land was a determination that the lands were not mineral.

VIII.

PETITIONER ATTACKS THIS JUDGMENT, ASSERTING THAT IT WAS NOT ON THE MERITS BUT WAS A DISMISSAL FOR LACK OF JURISDICTION. IN SUPPORT OF THIS ASSERTION, PETITIONER CITES CERTAIN PRELIMINARY DISCUSSIONS AND THE TRANSCRIPT OF THE PROCEEDINGS BEFORE THE SECRETARY. BUT NEITHER THE PRELIMINARY DISCUSSIONS NOR THE TRANSCRIPT CAN BE USED TO CONTRADICT THE PLAIN TERMS OF THE JUDGMENT.

Counsel for petitioner attacks the force and effect of the judgment of the Secretary by asserting that, notwithstanding the language of the judgment itself, the Secretary, in reality, did not intend to decide the case on the merits, but intended to dismiss the case for lack of jurisdiction. In support of the position, that the judgment was not intended to be on the merits, petitioner makes four arguments:

(1) That the parties did not contemplate a hearing before the Secretary on the merits;

(2) That the notice of the hearing issued by the Secretary gave no notice that the case was to be decided on its merits;

(3) That the attorney for the claimants to the land did not ask for a decision on the merits;

(4) That the transcript of the hearing contains certain remarks made by the Secretary during the progress of the hearing which indicate that he did not intend to render a decision on the merits, but intended, on the contrary, to dismiss the contest for lack of jurisdiction.

Even if these contentions were all true, they could not be used for the purpose of contradicting and upsetting the plain terms of the formal judgment itself.

Smelting Co. v. Kemp, 104 U. S. 636.

This was an action to recover possession of certain land in Leadville, Colorado. The plaintiff offered as evidence a patent of the United States under which it claimed. The defendant attacked the validity of this patent, contending that the patent was irregularly issued, *and as proof offered in evidence a certified copy of the proceedings in the General Land Office upon which the patent had been obtained.* Objection was made to this record, but the court overruled the objection and admitted the record.

This Court held that it was error to admit the record of the proceedings for the purpose of discrediting the patent.

Baxter v. Buckholz-Hill Co., 227 U. S. 637.

In this case the District Court had entered a decree in favor of Baxter without prejudice to a new action against him. The Circuit Court of Appeals affirmed the decree but wrote an opinion showing that the case was decided on the merits. A new suit was commenced against Baxter and he set up the previous judgment as a bar, claiming that although the judgment recited that it was without prejudice, it was in reality a judgment on the merits, and relied upon the opinion of the court which was clearly rendered on the merits. In other words, it was contended that the opinion of the court could be looked into in order to change the effect of what the judgment itself showed.

This court said at page 638:

> "The matter was still in the breast of the court; it was free to change its opinion if it saw fit, and it was free to do so by changing the decree without delivering a new opinion to explain what the decree made manifest. If it thought, rightly or wrongly, that the collateral question of the present defendant's liability could not be tried in that case, it properly embodied its decision in the decree. *The decree is the dominant act* and cannot be given a greater effect than it purports to have and than would be warranted by the opinion that the court finally reached."

So in the present case, if the Secretary had in fact indicated by his verbal utterances that he was dismissing the proceeding for lack of jurisdiction, the matter was still in his breast. It was still for him to consider. He still had a right to change his mind, and when he caused the formal written judgment to be entered up, reciting that it was entered after a consideration of the facts, as well as the law, and ordering the case finally closed, it is conclusive that the judgment was rendered on the merits, no matter what his remarks or his opinion might indicate. As a matter of fact, however, every remark that the Secretary made shows that he had nothing in mind except to decide the case on the merits (infra p. 47).

West v. Hitchcock, 205 U. S. 80.

This was a suit for mandamus to require the Secretary to approve the selection of 160 acres to West who claimed to be a member of the Wichita tribe of Indians by adoption. The answer of the Secretary

set up that he had already decided that West was not a member of the tribe, and gave a letter of a certain date as containing his decision. It was claimed that the reasons set forth in this decision were not sound and, therefore, the decision against West was erroneous and could be ignored.

Referring to this the court said at the bottom of page 85:

> "Even if those (the reasons for the decision) given in the letter of July 3, 1901, had been bad, they could not be taken to exhaust the Secretary's grounds. He has not disclosed to the court any statement of those grounds purporting to be exhaustive and complete, and the court cannot make an *inquisition into his mental processes* to see whether they were correct. See *De Cambra v. Rogers*, 189 U. S. 119."

De Cambra v. Rogers, 189 U. S. 119.

The court said at page 122:

> "It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination."

In the present case, counsel do go into the mental processes of the Secretary. They quote certain arguments made before the Secretary and certain remarks made by the Secretary and argue therefrom that the Secretary intended to decide something entirely different from what the judgment itself says was decided.

Martin v. Evans, 85 Md. 8; 36 Atl. 258.

The court said:

> "The broad terms of the decretal order dismissing the bill cannot be limited, qualified or restricted by the opinion filed in the equity case. 'The opinion of the judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused. The judgment or decree is the fiat or sentence of the law, determining the matter in controversy in concise, technical terms, which must be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts depend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them.' *State v. Ramsburg*, 43 Md. 333. Or, as succinctly expressed in *Durant v. Essex Co., Supra*, the reason for the signing of a decree 'is no part of the judgment itself.' *The decree, and not the opinion is the instrument, through which the court acts. Woods v. Fuller*, 61 Md. 460."

It appears therefore that the transcript of the record cannot be looked into to establish errors nor to contradict the plain words or effect of the judgment that it was rendered on the merits. If the transcript cannot be used to contradict the words or effect of the judgment, it is obvious that neither the argument of counsel nor the preliminary conferences can be used for such purpose.

IX.

HOWEVER IF THE PRELIMINARY PROCEEDINGS AND THE TRANSCRIPT OF THE HEARING BE LOOKED INTO IT DISCLOSES THAT PETITIONER IS WRONG IN EACH ONE OF HIS FOUR CONTENTIONS AND WE FIND

(1) THAT THE PARTIES DID CONTEMPLATE A HEARING ON THE MERITS;

(2) THAT THE NOTICE OF THE HEARING GAVE NOTICE THAT THE MERITS WERE TO BE DECIDED;

(3) THAT THE ATTORNEY FOR CLAIMANTS ASKED FOR A DECISION ON THE MERITS; AND

(4) THAT THE SECRETARY INTENDED TO AND DID DECIDE THE CASE ON THE MERITS.

1. Preliminary Conferences Between the Representatives of the Government and the Representatives of the Transferees Show That Both Parties Were Seeking a Decision on the Merits.

Early in 1921, both the Secretary of the Navy and the Secretary of the Interior had requested the Attorney General to take appropriate action to protect the Government's interest in this section (R. 67). In April, 1921, Assistant Attorney General Riter, who had the matter in charge for the Department of Justice, reached the conclusion that the determination of the title to this section was a matter within the jurisdiction of the Department of the Interior and that the Department of Justice could do nothing except to in-

stitute proceedings to protect the land, either by the appointment of a receiver or by an injunction against further operation,

> "Pending the determination by the Department of the Interior of the known mineral or non-mineral character of said land at the date of the approval of the survey" (R. 68).

Assistant Attorney General Riter, Commander H. A. Stuart of the Navy, who was in charge of the Naval Reserves, and J. Crawford Biggs, an attorney of large experience in this character of litigation, who was called into consultation by the Department of Justice, reached the conclusion that no proceedings were advisable by the Department of Justice,

> "providing that there would be an early hearing in the Interior Department to determine the character of said land" (R. 68).

The representatives of the Department of Justice and of the Navy also concluded that no purpose would be served by the institution of the proceedings by the Department of Justice, providing the operators of the land would agree to suspend further development,

> "pending the speedy determination by the Department of the Interior of the question of title" (R. 68).

Commander Stuart even went further. He was of opinion that no receiver was necessary, and that the issuance of an injunction would be disastrous,

> "in view of the fact that assurance had been given by the Interior Department that there would be an

> early hearing to determine the character of the land" (R. 69).

On May 16th, 17th, 18th, 19th and 20th, 1921, conferences were held between the representatives of the Department of Justice and the Navy and Mr. Sutro representing the claimants to the land (R. 69). On May 23d, Assistant Attorney General Riter wrote a letter to Mr. Raymond Benjamin, Special Assistant to the Attorney General, situated in San Francisco, which letter covered the result of the foregoing conferences.

In this letter, Mr. Benjamin, in speaking of Mr. Sutro's contention, said:

> "The main thing to which he called attention was this: That about the time the State of California acquired title to the section in controversy the regulations of the Interior Department were to the effect that the presence of mineral must be actually known so far as any particular section is concerned, it being immaterial what conditions exist in the surrounding area. He therefore urged that inasmuch as this particular section was not known to contain oil at the time the State acquired title, it was immaterial to enter on a discussion of the presence of oil in the adjoining territory" (R. 78).

It is thus apparent that in the preliminary conferences, Mr. Sutro was not urging that the case be dismissed for lack of jurisdiction, but was making the same argument which he later made to the Secretary. That is, that under the rule of the Department the fact that no mineral was exposed on a school section determined its non-mineral character for the purposes of the grant.

Mr. Riter also said in this letter:

> "The upshot of it all was that it was not for this Department to determine whether this section was known mineral land at the time the State acquired title and that all we were asked to do is to preserve the property *until this question of fact could be settled by the Interior Department.*
>
> * * * * * * * * *
>
> "We regard the Standard Oil Company as entirely solvent and we are of the opinion that a scheme can eventually be worked out by which the drilling operations of that company will be carried on in such a way as to preserve the property from the operation on adjoining ground without exhausting the property of all of its oil contents *pending a determination of this question of fact*" (R. 78).

This again shows that Mr. Riter understood that the Secretary of the Interior was to be asked to decide the question of fact as to whether this section was or was not known mineral land.

At the foregoing conferences an agreement was reached whereby the claimants to the land agreed with the Department of Justice to refrain from further drilling of said land,

> "upon the understanding that a speedy determination would be had in the Department of the Interior with respect to the title to said Section 36" (R. 69).

It was also agreed that the Department of Justice would take no action and that there should be no further development of said lands,

> "until a determination by the Department of the Interior as to the known mineral character of said land" (R. 69).

At the same time an understanding was reached between the representatives of the claimants and the Department of Justice that the claimants to the land,

> "would immediately endeavor to secure from the Department of the Interior an early hearing and determination with respect to the known mineral character of said Section 36 at the date of the approval of the survey thereof and with respect to the title to said Section 36" (R. 69).

After this agreement was entered into the claimants to the land presented to the Secretary of the Interior,

> "their request for a determination with respect to the title to said Section 36" (R. 70).

So we see that petitioner is entirely wrong in his first assertion that the parties did not contemplate a hearing on the merits. On the contrary, the purpose of all the parties was to secure a hearing on the merits and to secure a decision by the Secretary which would settle the question of title.

2. Petitioner Next Contends That the Written Notice of the Hearing Gave No Notice That the Hearing Was to be on the Merits.

But there was no necessity for the Secretary of the Interior to give any notice of this hearing to any other Department of the Government. There is no statute, nor is there any rule of the Department requiring

the service of notice upon any other officer of the United States. The reason for this is that the Secretary of the Interior himself represents the United States in all such proceedings.

> *Knight v. United States Land Association*, 142 U. S. 161, page 181 of opinion.

Notwithstanding that there was no necessity for any notice, nevertheless, the Secretary of the Interior did give a formal written notice to both the Department of Justice and to the Department of the Navy of this hearing (R. 89, 90). This written notice contains the plain statement that there was to be an oral hearing,

> "to determine whether or not said section passed to the State of California under its school grant" (R. 89).

3. Petitioner Next Contends That at the Hearing Itself the Secretary was Not Asked to Render a Judgment on the Merits But on the Contrary was Asked to Dismiss the Case For Lack of Jurisdiction.

The representative of the claimants to the land filed a brief before the Secretary and also made an oral statement of facts and an argument. The brief is set forth in the record at page 79 and the oral statement of facts and arguments at page 37.

It is of no consequence to inquire into what counsel who appeared before the Secretary did or did not say. Indeed, as we have seen, no inquiry whatever into the transcript or brief, is permissible to secure matter to impeach the judgment on collateral attack, but because petitioner's whole case depends upon his argument on this one proposition, we cheerfully follow him into his

chosen field, although convinced that the judgment could not be impeached by either the transcript or the brief, no matter what might be found therein. We, therefore, call to the attention of the Court a few of the matters contained in the brief and in the oral statement, which show that the request made upon the Secretary by the attorney for the claimants was a request for a decision on the merits.

Brief Filed Asked a Decision on the Merits.

On May 26th, Mr. Sutro filed with the Secretary of the Interior a brief accompanied by a map. The letter with which said brief and map were transmitted is set forth on page 80 of the record. This map showed the state of development in 1903 of a very large area of the land surrounding Section 36, and a total want of of development for a radius of miles around the Section. The map so filed showed substantially the same state of development as the map attached to the complaint (R. 70, 16). Preliminarily, it might be asked why Mr. Sutro should have taken the trouble to prepare and present a map showing the oil development of all the surrounding territory at the date of the approval of the survey if he were seeking a dismissal for lack of jurisdiction. The mere fact that the map was filed and discussed before the Secretary, establishes that Mr. Sutro was seeking a decision on the merits as to the known character of the land.

The first paragraph of the brief is as follows:

> "This is the argument in support of the request that the Secretary of the Interior *decide that in view of the previous action of the Department and of its regulations in force in January, 1903, the*

title to said section is vested in the State of California or its grantees." (R. 79).

This is a plainly stated request that the Secretary "*decide*" that "*the title to said section is vested in the State of California or its grantees.*" Counsel distort this plain request for a decision that the title has vested in the state into a request that the Secretary make no decision as to title but dismiss the case for lack of jurisdiction.

The ground upon which Mr. Sutro asked the decision as to title is set forth in the paragraph, as follows:

> "The previous action of the Department and its regulations in force in January, 1903."

"The previous action of the Department" was, of course, the restoration to agricultural entry made by the Department in 1904. The regulations referred to were the regulations which prohibited a state from surrendering a school section as mineral without proof that there was an actual exposure of mineral on the ground. That regulation is as follows:

> "RULE 2. The State will not be permitted to make selection in lieu of land within a school section alleged to be mineral in character and for that reason excepted from its grant, whether returned by the Surveyor General as mineral or otherwise, in the absence of satisfactory proof that the base land was known to be chiefly valuable for mineral at the date when the State's right thereto would have attached, if at all. The proof must show the kind of mineral discovered upon the land and the extent thereof, when and by

> whom the discoveries were made, etc., etc. If in any case the proof does not clearly show that the base land was known to contain valuable mineral deposits and to be chiefly valuable on account of such deposits at the date the State's right would have attached thereto, a selection in lieu thereof will not be permitted." (R. 4.)

The restoration to agricultural entry, together with the reason for such restoration, made a Departmental record of the fact that no mineral had been exposed on the section. Mr. Sutro argued that this fact coupled with the regulation which prohibited a state from surrendering a school section without such exposure of mineral entitled him to ask that the Secretary decide that the title to the section had vested in the state.

After stating many facts as to the known character of the land and citing many cases as to what constitutes known mineral land, Mr. Sutro again says in his brief (R. 87);

> "There is no reason why this *decision as to the title of the state* should not be made now."

This would be an extraordinary statement for an attorney who was arguing that there could be no decision because there was no jurisdiction.

Mr. Sutro then elaborated his argument that under the regulations of the Department a school section could not be considered as known mineral land unless there was an actual exposure of mineral on the land, and that the taking of evidence as to geological conditions concerning this section would be useless, because, it being an admitted fact that no mineral was

exposed, the decision must be that the land was not known mineral land, no matter what such geological evidence might show.

Mr. Sutro then said (R. 87):

> "*Certainly the equities of this situation entitle us to a decision now on the question which in any event will ultimately have to be decided by the Secretary of the Interior.* The issue which we now tender can be decided just as well at this time as at the end of a protracted hearing on the facts."

Here the Secretary was asked to decide at once the question as to the known mineral character of the land and consequently the validity of the state's title. It was pointed out that in any event the Secretary must ultimately make that decision and that he could as well make it then without a long hearing on the facts, because there was one admitted fact which made all other facts immaterial, that is, there was no exposure of mineral on the land nor indeed for many miles distant from the land.

Mr. Sutro next recites certain facts, and then says (R. 88):

> "These facts, I submit, offer equities which entitle the state to ask that the Secretary of the Interior *should exercise his clear jurisdiction* and *decide* the question presented at this time."

This shows that Mr. Sutro not only did not claim that the Secretary had no jurisdiction, but in positive terms he asserted that the Secretary had "clear jurisdiction."

On record page 88, Mr. Sutro says:

> "In this case, the government must prove that the land was mineral. According to the tests and regulations of the Government, itself, that proof is not possible and therefore we respectfully submit it should be *decided that the state's title to this section is valid.*"

Mr. Sutro is here referring to the difference between lieu selections under grants to railroads and school land grants. He has pointed out that under grants to railroads, or lieu selections thereunder, the railroad is the moving party, and assumes the burden of proving that the land is non-mineral in order to secure title. Under school grants there is nothing for the state to do or to suggest; the presumption is that title has passed, and if the United States contests, it has the burden of proving that the land was known to be mineral. He then says that such proof cannot be made in this case because of the admitted fact that no mineral was exposed on the section and under the rules of the Department the land must necessarily be determined to be not known mineral land.

In other words, Mr. Sutro is not saying that the Secretary has no jurisdiction to decide, but he asks affirmatively that the Secretary decide that the state's title is valid because of the one controlling fact that there was no exposure of mineral on the land.

Oral Statement and Argument of Mr. Sutro Also Asked for a Decision on Merits.

The opening paragraph of the oral statement made by Mr. Sutro at the hearing on June 8th is as follows:

> "This is an application, Mr. Secretary, to have the Department of the Interior *exercise its jurisdiction* to determine that Section 36 in Township 30 south, Range 23 E, in Kern County, in California, is a school section in place, title to which is vested in the state and that the title has been so vested since the day of the survey and the approval of that survey" (R. 37).

Mr. Sutro is here following his brief, and he now asks the Department to "*exercise its jurisdiction to determine*" that title has "*vested in the state.*" This is entirely inconsistent with the theory that his argument was that the Secretary had no jurisdiction to decide the question of title.

Mr. Sutro then enumerated a long list of facts concerning this land, which he contended established the fact that it was not known mineral land in 1903. Among other facts so enumerated by Mr. Sutro are the following:

(1) In 1916 this section 36 was tendered to the Navy and that the Navy rejected the tender because the land was not oil land and that the Navy's oil expert testified before the Senate Committee in 1916,

> "that this was not commercial oil land at all and was of no value to the Navy." (R. 39.)

(2) Owing to the great oil shortage, the Standard Oil Company drilled this land and discovered oil in 1919. (R. 39.)

(3) The surveyor's mineral return was based upon his notes that asphaltum exudations occurred throughout the township. Mr. Sutro then stated that these notes were not true, saying,

> "But the fact is that there is no asphaltum outcropping in this township and there never has been and I don't think that is disputed." (R. 40.)

In passing, it might be observed that that fact was agreed to at the hearing and is agreed to here, the Agreed Statement of Facts reciting that,

> "no mineral was exposed in this township prior to the year 1911" (R. 66).

(4) Mr. Sutro then stated that the surveyor confused this township with an adjoining township where asphaltum exudations did occur. (R. 40.)

(5) Mr. Suto then handed to the Secretary a piece of calcareous sandstone which he stated was a sample of the only outcropping in the township. (R. 40.)

(6) Mr. Sutro then stated that under the decisions of the Land Office and the Supreme Court of the United States, the Surveyor's report is of very slight consequence. (R. 40.)

(7) Mr. Sutro then stated that the decision of this court in the Southern Pacific case, which Mr. Sutro called the Elk Hills Case, was not controlling because in that case the railroad had committed a fraud and he called attention to the distinction between railroad grants and school grants. (R. 41.)

(8) Mr. Sutro then referred to the map which he had previously filed with the Secretary and called attention to the fact that it showed the condition of the surrounding land in 1904, one year after the approval of the survey, and the fact that this map showed no development within a number of miles of this section. (R. 41.)

(9) Mr. Sutro then called attention to the regula-

tion of the Department, which prevented a state from surrendering a school section and selecting another section in lieu thereof, unless there was an actual exposure of mineral on the section surrendered, and argued therefrom that if the state could not surrender a section as mineral, it ought to be allowed to to keep it as non-mineral. (R. 42.)

(10) Mr. Sutro then referred to a certain contest which had been pending in the Department on a section in the vicinity of this Section 36 and said that in 1901 the Department had ruled in that case the land would not be classed as mineral unless mineral was exposed in paying quantities. (R. 44.)

(11) Mr. Sutro then said,

> "Now so much for this question as to whether or not this section in the absence of the discovery of mineral could be considered a mineral section. I think it could not" (R. 44).

Mr. Sutro here states in plain language that all his previous argument, consisting of eight pages of the record, has been devoted to the question as to whether or not this land under the rules of the Department was known mineral land.

Nine-tenths at least of both Mr. Sutro's brief and his oral argument was devoted to the proposition that the land was not known mineral land on account of a number of physical facts which he recited, and particularly on account of the rule of the Department that a school section could not be considered mineral unless there had been an actual discovery or exposure of mineral.

The remaining portion of his argument, he devoted to a consideration of the effect of the restoration to

agricultural entry in 1904. Concerning this restoration, we think the logical conclusion from the argument is that Mr. Sutro was putting it forward as evidence of the fact that to the Department at least the land was not known mineral land. It is obvious that if the Department had known this was mineral land, the restoration in 1904 would never have been made. The restoration was at least some evidence that the land was not known mineral land.

It is true that several times Mr. Sutro referred to this restoration as an adjudication or a determination, but never once did he argue that the Department had lost jurisdiction. Over and over again the Secretary was asked to exercise his clear jurisdiction and decide the case.

And finally since counsel claim that the brief filed before the Secretary and the argument made before him are to be considered as arguments that the matter had previously been decided and that the Secretary should dismiss the contest for lack of jurisdiction by reason of the previous action of the Department, we ask counsel for petitioner, what purpose they attach to the following statements of fact made to the Secretary in 1921, none of which bore on the previous action of the Department or its effect:

From the brief:

(1) The history of the title of the section after 1904 (R. 80, 81);

(2) The offer of the land in 1916 to the Navy and the rejection of that offer on the ground that the land was not mineral (R. 81);

(3) The subsequent development of the section (R. 81);

(4) The argument as to the binding force of the regulations of March 6, 1903, requiring proof of discovery of mineral, the extent thereof, etc., etc., before a school section could be classified as mineral (R. 83, 86);

(5) The argument as to the Surveyor General's return (R. 86).

From the transcript:

(1) The certificate of the register and receiver given in 1908 that the section was free of all claim by the United States (R. 38);

(2) The offer of the section to the Navy in 1916 and its rejection (R. 39);

(3) The drilling of the land in 1919 (R. 39);

(4) The surveyor's return and the reason for his notation (R. 40);

(5) The want of legal effect to be attached to a surveyor's return (R. 40);

(6) The Elk Hills decision and its inapplicability (R. 41);

(7) The maps used at the hearing showing the state of development of the surrounding land at the date of the approval of the survey (R. 41, 42);

(8) The introduction in evidence of a specimen of the only outcropping known on Section 36—a calcareous sandstone—white in color (R. 40);

(9) The regulations of March 6, 1903, and their effect in requiring proof of discovery, etc., to sustain a mineral classification (R. 42);

(10) The argument as to the binding force of this regulation in determining that this section was non-mineral in 1903 (R. 42, 43);

(11) The argument based on the Tulare Case (R. 44);

(12 The absence of fraud (R. 46);

(13) The argument on the equities (R. 46);

How did these facts and arguments concern the finality or lack of finality of the proceedings culminating

in the Department's order of 1904, relieving the section from suspension? It is apparent that all the foregoing facts and arguments could have been used only in support of the request for a decision on the merits. Mr. Sutro repeatedly asserted that the Secretary had jurisdiction to decide the contest, and he repeatedly asked for a decision that the state's title was valid. So that it is established that the Secretary was in fact asked to decide the case on its merits, not to dismiss it for lack of jurisdiction.

4. Remarks of Secretary Indicate That He Considered Nothing But the Merits of the Case.

Since counsel have suggested that the Secretary did not intend to decide the case upon the merits but intended to dismiss the proceedings for lack of jurisdiction *we here note every remark the Secretary made during the progress of the hearing:*

(1) The first remark made by the Secretary was when he inquired about the litigation against the Southern Pacific Railroad and asked if the contest as to the **Section 36 was commenced** at approximately the same time (R. 39). Obviously this question could have had nothing to do with the Secretary's jurisdiction or lack of jurisdiction.

(2) The Secretary next asked about the surveyor's field notes as to outcroppings (R. 41). Manifestly this refers to the merits and not to any alleged lack of jurisdiction.

(3) The Secretary then stated that Mr. Sutro's theory was that if the United States, upon the state's application to select other land in lieu of a school section, would not have classified the section as mineral,

the United States could not thereafter upon a subsequent discovery claim the section as mineral (R. 43). It is apparent that this remark related to the merits and not to the lack of jurisdiction.

(4) The Secretary then asked: "When did you drill this land?" (R. 45). Obviously this question was directed to the merits.

(5) The Secretary next stated that Mr. Sutro was asking the Secretary that if the Secretary were convinced that the rule as stated by Mr. Sutro were correct, to so hold at that time without the delay of a trial in the land office (R. 46). Mr. Sutro had argued that the rule of the Department which would not permit a state to surrender a school section as mineral unless there was an actual exposure of mineral, prevented any school section from being determined to be known mineral land unless there was such an exposure. The Secretary was referring to this statement of the rule and this argument which Mr. Sutro had made. This obviously referred to the merits and not to lack of jurisdiction.

(6) The Secretary then asked when the contest was directed and what was the cause of the long delay. (R. 46). Manifestly, this could have had nothing to do with jurisdiction.

(7) After Mr. Sutro had stated that the chief of the field division had said that the Department had no faith in the proceedings and suggested this as the reason for delay, and after Mr. Sutro had conceded that the statement of the chief of the field division did not affect the *merits*, the Secretary agreed and said that the chief's statement would be immaterial, but that the fact that the proceedings were brought in 1914 and allowed to lie idle until after the discovery

of oil and then revived was a matter of interest to him (R. 47.) Obviously this could have nothing to do with a lack of jurisdiction.

(8) The Secretary then asked Assistant Secretary Finney if the State of New Mexico could make a valid lease of its school sections for mineral (R. 48). This also must have been directed to the merits and could have had nothing to do with an alleged lack of jurisdiction on account of the restoration to agricultural entry in 1904.

(9) The Secretary then pressed Mr. Finney and twice asked him as to whom it must be known that the land was mineral in order to constitute known mineral land (R. 49). It is once more perfectly obvious that the Secretary was considering the merits of the case. He was trying to find out what constituted known mineral land and to whom the fact of mineral must be known in order to make it known mineral land.

(10) The Secretary then stated that the geological conditions would remain the same at all times and, if geological conditions, without some one having knowledge thereof, would be sufficient to establish land as known mineral land, then the state never could get a title to any school section which might afterwards prove to be mineral (R. 49). It is apparent that the Secretary, in view of the rule of the Department that a school section could not be considered as mineral unless there was an actual exposure of mineral, was not impressed with Mr. Finney's argument that geological conditions, should be taken into consideration. In any event, however, the Secretary was considering nothing but the merits.

(11) He next stated that the government ought to

classify the land (R. 49). Again this could have nothing to do with jurisdiction.

(12) Finally he asked the Government's representatives if Mr. Sutro's statement of the case was admitted (R. 49). The agreed statement of facts shows that this inquiry of the Secretary was directed to the facts stated by Mr. Sutro (R. 72).

We have thus shown that every word which the Secretary uttered indicated that at all times he was considering the merits of the case and not once did he make any inquiry or make any statement which had the slightest reference to the question of jurisdiction.

The main argument made by Mr. Sutro was that the land must be held to be not known mineral land because there was no exposure of mineral. Mr. Sutro argued that under the regulations of the Department that one fact was decisive of the question. He contended that evidence of geological conditions would be immaterial because of the one controlling fact that no mineral was exposed. He distinguished the Southern Pacific and Diamond coal cases where geological conditions were held to be admissible from all school section cases, pointing out that the regulation of the Department requiring an exposure of mineral applied to school land only and that school land was not involved in either the *Southern Pacific* or *Diamond Coal* case. The authorities he cited contained the argument that under the decisions and regulations of the department the utmost definiteness was required in the proof of the mineral character of a school section to entitle the state to surrender it as a mineral section—differentiating school land cases from those cases in which applicants for lieu land could not select land which they had reason to believe was mineral as in

the Southern Pacific case cited by the Government.

The argument made by Mr. Sutro was certainly a very forceful argument. But it is entirely immaterial whether it was a sound argument or otherwise. A judgment cannot be upset because the attorney securing the judgment makes a faulty argument. Nor can a judgment be upset upon a collateral attack because the judge rendering the judgment has come to an erroneous conclusion.

X.

THE PROCEEDINGS BEFORE THE SECRETARY WERE IN ACCORDANCE WITH THE RULES OF THE DEPARTMENT AND IN ACCORDANCE WITH THE PRACTICE. ALL PARTIES AGREED THAT THERE WAS AN EXIGENCY REQUIRING A PROMPT DECISION. THE SECRETARY HAD JURISDICTION TO DECIDE THE CONTEST WITHOUT PRELIMINARY HEARINGS BY SUBORDINATE OFFICERS. THE GOVERNMENT HAD FULL OPPORTUNITY TO AND DID PRESENT ITS CASE.

On pages 73 and 74, counsel for petitioner complains that the method of procedure adopted by the Secretary prevented the Government from presenting its case and from putting in any evidence on the question of fact as to whether the land was or was not mineral and that such procedure was against the rules and practice of the Department, and that therefore the judgment rendered on the merits is a void judgment.

The first answer to this argument is that the pro-

cedure adopted by the Secretary was not contrary to the Rules of Practice nor to the procedure but in conformity therewith.

The Rules of Practice contain the following:

> "RULE 85. Motion for the exercise of supervisory power will be considered only when accompanied by positive showing of extraordinary emergency or exigency demanding the exercise of such authority.
>
> "In proceedings before the Secretary of the Interior the same rules shall govern, insofar as applicable, as are provided for proceedings before the Commissioner of the General Land Office.
>
> "RULE 86. No rule here prescribed shall be construed to deprive the Secretary of the Interior of any direct or supervisory power conferred upon him by law" (R. 90, 91).

That an exigency existed demanding the exercise of the supervisory power of the Secretary is shown throughout the record. The Department of Justice was considering the extraordinary remedy of having a receiver appointed and an injunction issued against further operation of the land. At the time the property was a highly developed property producing large quantities of oil and there was also danger of drainage from adjoining wells. A speedy decision as to the title to this land was imperative. A real exigency existed which was recognized by every one. The agreement reached between Mr. Suto and the representatives of the Department of Justice and of the Navy, that no suit on behalf of the Government should be filed and that further development should be suspended was dependent upon securing an early decision by the Department as to the character of the land and there-

fore a decision as to where the title vested (R. 69). The exigency was known to every one and was stated by Mr. Sutro orally at the hearing before the Secretary as follows:

> "MR. SUTRO. A delay here is a taking of property. I mean by that that we are now under bond, so to speak, to the Department and we are faithfully observing it, of course, not to use this property, except so far as to protect it. I have given the Assistant Secretary Mr. Finney my assurances about that and that is to be confirmed in writing. That means that for two or three years, we cannot deal with the property. It not only means that; it means that in the meantime the proceeds must be impounded" (R. 46).

The very exigency, which the rules provided for, existed, and the hearing, therefore, was in accordance with the rules.

The Agreed Statement of Facts shows that the hearing was also in accordance with the practice. This Agreed Statement sets out that while it has never been the practice of the Secretary to take the testimony of witnesses on disputed questions of fact,

> "It has been the practice of the Secretary of the Interior to permit presentations in cases pending before him, including statements of agreed facts and of facts contained in the records, followed by arguments thereon and to permit the introduction of documentary evidence and to render decisions upon the record and upon such presentations" (R. 73).

At the hearing before the Secretary, Mr. Sutro made a statement of facts. These facts were agreed to by

the representatives of the Government (R. 72). There was an argument upon these facts and some documentary evidence was introduced (the maps and records of the Department). There was no probative fact that was disputed. It is true that the ultimate fact as to whether this land was or was not known mineral was disputed but the probative fact that there was no exposure of mineral, together with the other probative facts, stated by Mr. Sutro, were not disputed. There was thus an exact compliance with the practice of the Department.

Government Representatives Had Opportunity to and Did Present Their Case.

A second answer to counsel's argument is that the representatives of the Government did have an opportunity to and did present their case. Thus Mr. Finney contended that certain evidence should be considered (R. 48, 49). The secretary ruled that it was immaterial. There was thus a hearing in accordance with the rules and in accordance with the practice upon an agreed statement of facts.

But in any event a judgment is not void because the judge who tried the case rules out certain offered evidence.

The Secretary of the Interior Being the Head of the Department Had Jurisdiction to Decide the Contest Even Though There Had Been No Previous Trial in the Local Land Office and No Hearing Before the Commissioner.

It has been uniformly held both by the Department and by this court that the Secretary of the Interior can decide any matter pending in the Department at any stage of the Proceeding, that he has complete jurisdiction to do this and that he need not follow the course of holding a trial in the Land Office, followed by an appeal to the Commissioner, and finally by an appeal to the Secretary.

Knight v. United States Land Association, 142 U. S. 161;
Hawley v. Diller, 178 U. S. 476;
Lake Superior Ship Canal Co. v. Patterson, 30 L. D. 160;
Harvey M. LaFollette, 26 L. D. 453.

XI.

THE RULE OF THE DEPARTMENT THAT SCHOOL LAND WOULD NOT BE CONSIDERED MINERAL UNLESS THERE WAS AN ACTUAL EXPOSURE OF MINERAL WAS NOT ABROGATED.

At pages 35-37 of his brief, counsel argues that the rule adopted by the Department on March 6, 1903, to the effect that a State would not be allowed to surrender a school section on the ground of its mineral character unless there was an actual exposure of mineral was not followed by the Department. In support of his statement, he cites *Kern Oil Co. v. Clotfelter*,

30 L. D. 583; *ibid*, 33 L. D. 291; and the decision of Secretary Hitchcock, 34 L. D. 194.

It is to be observed that the rule of the Department applies only to school sections and the right of a state to surrender a school section as mineral. Neither of the decisions cited deal with school sections.

In the *Clotfelter* case, Clotfelter endeavored to surrender land of which he was the legal owner and which had been conveyed by a patent from the United States. The land so owned was situated within the limits of a public forest reservation. Clotfelter sought to exchange this land for other land selected by him in the Kern River Oil field. To effect the exchange it was necessary to show that the land selected was not mineral. The ruling of the Department was that under such circumstances evidence of geological conditions on adjacent land was admissible.

The decision by Secretary Hitchcock on October 26, 1905, reported in 34 L. D. 194, had nothing to do with the right of a state either to retain or surrender a school section, but covered only the procedure to be followed in determining whether lands should be classified as coal lands or grazing lands. That Secretary Hitchcock did not intend to change the rule with regard to school land is shown by the fact that on January 10, 1906, less than ninety days after the date of the letter concerning the classification of coal lands, he approved new regulations for school lands containing the old regulation requiring an *exposure* of mineral before a state could surrender a school section, 34 L. D. 365.

Counsel also cite the *Diamond Coal Case*, 233 U. S. 236, and the *Southern Pacific Case*, 251 U. S. 1. Neither of these cases had anything to do with school lands. In

the coal case the Government sought to set aside patents which the coal company had secured to land immediately adjacent to its coal mines under a statute which required proof of the non-mineral character of the land before a patent could be issued. It was evident that a fraud had been perpetrated upon the Government and this court held in that case that evidence as to geological conditions on adjacent territory was properly admissible.

In the *Southern Pacific Case*, the Southern Pacific had obtained patents to certain sections of oil land under its grant from Congress. Under this grant, it was necessary for the Southern Pacific to prove that the land for which patent was requested was not mineral. This court held that certain officials of the Southern Pacific had perpetrated a fraud upon the Government in making affadavit that the land was non-mineral when they believed the land was actually mineral. The court held that evidence as to geological conditions was properly received against the Railroad which had initiated the proceedings for the patents under attack upon representations that the land was non-mineral.

The rule of the Department was on its face limited to school sections. None of the cases cited have any application to school sections. Just what the purpose of the Department was in applying one rule to school grants and an entirely different rule to other grants, is immaterial. The fact is that such a distinction was made by the rules of the Department. Doubtless, some good reason existed for the distinction. At the hearing before the Secretary, Mr. Sutro offered what seems to be a reasonable explanation, that it was to prevent the states from continuing the practice of surrender-

ing worthless land as mineral and receiving valuable lieu land therefor (R. 43).

Regulation Was Urged Upon Secretary Not as a Determination But as a Reason for Deciding That Land Was Not Known Mineral.

On pages 33-37 of his brief, counsel makes an elaborate argument that the regulation of March 6, 1903, was not a determination of the non-mineral character of the section in question. With this statement, we are in full accord. We have never made any contrary claim. Nor did Mr. Sutro make any other claim, either in his brief or in his oral argument before the Secretary in 1921. He insisted that this rule should be followed by the Secretary in making his decision as to whether or not this land was known mineral land and he argued that this rule, coupled with the admitted fact that there was no exposure of mineral compelled the holding by the Secretary that the land was not known mineral.

It is obvious that this general regulation, which as counsel for petitioner state was a rule of evidence, could not be a determination of the non-mineral character of any particular piece of land and Mr. Sutro did not make any such absurd argument. The fact, however, that he laid such emphasis upon this regulation and upon the fact that no mineral was exposed on the section or in the entire township nor for many miles distant indicates clearly that he was not seeking a dismissal of the contest for lack of jurisdiction, but was seeking a judgment on the merits that the land was not known mineral land.

XII.

THE STATE'S OFFER TO SURRENDER THIS SECTION AND THE WITHDRAWAL OF THAT OFFER DID NOT CONSTITUTE A WAIVER. AN UNACCEPTED TENDER OF A SCHOOL SECTION COULD NEITHER CREATE NOR DEFEAT RIGHTS IN THE LAND.

On pages 33 and 35 of counsel's brief, the offer by the state of California on March 6, 1903, to surrender this section and to select another section in lieu thereof and the subsequent withdrawal of that offer is discussed. We are unable to determine exactly what it is that counsel claims for these circumstances, but if they have any effect, apparently they would support the state's title. The statute gave the right to the state to select other land in case a sixteenth or thirty-sixth section was lost because of its mineral character. The Interior Department, up to the time of the adoption of the regulations of March 6, 1903, had uniformly held that the mere fact that the survey had returned the section as mineral was sufficient prima facie evidence of its mineral character to entitle the state to surrender the section and select another as indemnity therefor. 23 L. D. 423.

On March 6, 1903, this uniform ruling of the Department was changed by the adoption of the regulations previously set forth which prevented a state from surrendering a section as mineral, notwithstanding the surveyor's mineral return, unless there was an actual exposure of mineral on the ground. While this rule was adopted in the city of Washington on March 6, 1903, it must be apparent that the state of California had not heard of it on March 7, 1903, when it filed its

offer to surrender this section in the Local Land Office at Visalia, California. It is also to be observed that at the time this offer to surrender was filed, the land was still under suspension from agricultural entry. In April, 1904, the land was restored to agricultural entry and therafter, in August, 1905, the state withdrew its offer of this section by offering another section as lieu for the section which it had previously selected (R. 32).

So the whole transaction with refernce to this tender by the state amounts to this. Under the uniform rulings of the Department, the state had a right to surrender any section returned as mineral by the surveyor and select another section in lieu thereof. Acting under these rulings of the Department, the State made its offer to surrender this section. In the meantime, however, the Department had changed its rulings and the state was blocked in its effort to surrender this section and secure another section in its stead. Thereupon it did the only thing left for it to do—it withdrew its offer of surrender and later sold the land to other persons.

Nothing can be predicated, in respect to the State's title, on this state of facts, except the inference that the State recognized the order of April 5, 1904, as a classification of the land as non-mineral, and in view of the further action of the Department in promulgating the regulations of March 6, 1903, withdrew the land as a mineral base because it had no proof of its mineral character. It was argued to the Secretary that if the State could not surrender the land as mineral it ought to be allowed to retain it as non-mineral.

Years afterwards the purchasers, at great expense, developed the land and discovered oil. In 1921, after

large sums of money had been expended and numerous oil wells drilled, the Government, for the first time, actively asserted a claim to this land which had been offered to it and which it had refused to accept eighteen years before.

The cases cited by counsel for the Government at page 34 of their brief merely decided that an approved lieu selection estops the state from claiming title to the proferred base land and that state land included in federal forest or other reservations may be surrendered and the state title waived.

But obviously an unapproved tender can neither defeat nor create rights in the tendered land.

John W. Schofield, 42 L. D. 48;
State of New Mexico, 46 L. D. 217.

XIII.

THE EQUITIES ARE WITH RESPONDENT AND THE FACT THAT THESE EQUITIES WERE URGED BEFORE THE SECRETARY SHOWS TRANSFEREES WERE SEEKING DECISION ON THE MERITS. SUBSEQUENT WITHDRAWALS COULD NOT ALTER THE STATE'S RIGHTS.

On pages 38-45, counsel for petitioner claim that the equities in this case are adverse to the respondent. In support of this argument, he asserts that respondent was bound to have knowledge of the official records of the Department and the various withdrawals and classifications of this land which took place before the respondent actually drilled the land for oil. It is, undoubtedly, true that the respondent was charged

with notice of these various public records but respondent also knew that the title of the state and its transferees must be determined as of January 26, 1903, many years before the first withdrawal was made.

The Withdrawals Made Years After the State's Title Vested Could Not Affect That Title.

The State's title was to be determined by a determination of the known character of the land in January, 1903. Withdrawals made years afterwards could not affect the State's right to this land.

Payne v. Central Pacific, 255 U. S. 228.

Equities Argued by Mr. Sutro Show That He was Seeking a Judgment on the Merits.

On page 44, counsel for petitioner asserts that the equities claimed by respondent furnished the dominant note in Mr. Sutro's brief and argument before the Secretary in 1921. The equities which Mr. Sutro advanced then, and which even now seem appealing, were substantially as follows:

The fact that the land was withdrawn from agricultural entry in 1900 and after investigation was restored to agricultural entry in 1904 because no mineral had been discovered thereon; the fact that in 1903 the Department adopted the regulation which prevented the State of California from surrendering this section because there was no exposure of mineral thereon; the fact that in 1908 the state sold this land prior to any of the withdrawals; the fact that in 1909 the respondent purchased the land; the fact that in 1914 the government filed a contest against this section, challenging the state's title but never served it, allowing it to re-

main pigeon-holed until 1921; the fact that the land was offered to the Navy in 1916 and rejected on the ground that it was not oil land; the fact that respondent commenced drilling in 1916 and discovered oil in 1919; and the fact that after the discovery of oil the United States even then did nothing with its contest, but allowed the land to be fully developed at an expenditure of many hundreds of thousands of dollars before it took any action towards claiming the land.

Mr. Sutro could not have been asserting these equities in support of a request for a dismissal for lack of jurisdiction. The equities claimed could have had no bearing at all on the question of jurisdiction, but they had a material bearing on the merits of the case.

XIV.

THE JUDGMENT IS NOT VOID BECAUSE THE SECRETARY CONSIDERED CERTAIN EVIDENCE IMMATERIAL. A JUDGMENT CAN NEVER BE ATTACKED IN A COLLATERAL PROCEEDING FOR MERE ERROR.

This argument of counsel that this judgment is void because the Secretary excluded evidence as to geological conditions means that if a tribunal having jurisdiction of a case makes an erroneous ruling in excluding evidence, then the judgment is absolutely void, notwithstanding that no effort has been made to correct the error by appeal or by other direct attack.

If this argument be sound then every judgment can be attacked in a collateral proceeding for mere error, and if the second court, trying the collateral proceeding, be of opinion that the former court made erroneous rulings as to evidence, then the former judg-

ment can be held to be void because the second court differs with the first court as to the correctness of such rulings. Such a contention violates the whole law of judgments. It is fundamental that a judgment cannot be attacked collaterally for errors or irregularities or upon any ground except that it is absolutely void.

Counsel completely misconceive the theory of the hearing before Secretary Fall. The theory of that hearing was that the admitted fact that there was no exposure of mineral determined the case and that the result could not be changed no matter what other evidence might be offered. This was argued to the Secretary, and he evidently concurred in that view. The Secretary surely had jurisdiction to determine what evidence he considered relevant and what irrelevant.

We submit that he had the same power to reject the opinions of geologists as evidence of the mineral or non-mineral character of this school section as the present Secretary would have to admit them, and that the prior Secretary's decision that such evidence was not pertinent is as binding upon his successor as the decision of the present Secretary to receive and consider such evidence would be binding upon a succeeding Secretary.

A judgment rendered by a tribunal having jurisdiction is invulnerable against collateral attack on the ground of errors, irregularities, mistakes, erroneous conclusions of law or on any other ground, except that it is absolutely void.

Freeman on Judgments, Section 305.

XV.

PETITIONER'S ATTACK ON THIS JUDGMENT IS A COLLATERAL ATTACK. THE RULE THAT JUDGMENTS ARE IMPERVIOUS TO COLLATERAL ATTACK ON ANY GROUND, EXCEPT THAT THEY ARE VOID, APPLIES TO JUDGMENTS OF THE DEPARTMENT OF THE INTERIOR.

This is not an action which seeks a decree setting aside the judgment of the Secretary, but in this case the respondent sets up the judgment rendered by the Secretary as the basis for certain relief asked by respondent. The petitioner seeks to overcome the force and effect of this judgment by attacking its validity. This is a collateral attack.

A collateral attack is any attack upon the validity or effect of a judgment by some other method than a direct proceeding having for its purpose a setting aside or a vacating of the judgment. Motions for a rehearing, for a review, or for a new trial are direct attacks. An appeal to a higher tribunal is a direct attack. A bill in equity to set aside the judgment is a direct attack. All of these have for their purpose a setting aside of the judgment. But a contention that a judgment rendered in another proceeding is invalid for any reason, where no affirmative relief setting the judgment aside is sought or can be had, is a collateral attack.

The rule that judgments rendered by a tribunal having jurisdiction is invulnerable against collateral attack on any ground except that the judgment is void applies to judgments of the Secretary of the Interior.

United States v. Schurz, 102 U. S. 378;
Knight v. United States Land Association, 142 U. S. 161, see page 182 of opinion;
Noble v. Union River Logging R. R., 147 U. S. 165;
United States v. Winona, 67 Fed. 948, see p. 956;
Burke v. Southern Pacific, 234 U. S. 669, see page 691.

In the latter case, the court said on page 691 of the opinion:

> "When a patent issues it is to be taken, upon a collateral attack, as affording conclusive evidence of the non-mineral character of the land and of the regularity of the acts and proceedings resulting in its issue, and upon a direct attack, as affording such presumptive evidence thereof as to require plain and convincing proof to overcome it."

The court then answered a certain question certified to it as follows:

> "2. Does a patent to a railroad company under a grant which excludes mineral lands, as in the present case, but which is issued *without any investigation upon the part of the officers of the Land Office or of the Department of the Interior as to the quality of the land, whether agricultural or mineral*, and without hearing upon or determination of the quality of the lands, operate to convey lands which are thereafter ascertained to be mineral?
>
> Answer. A patent issued in such circumstances is irregularity issued, undoubtedly so, but as it is the act of a legality constituted tribunal and is done within its jurisdiction, it is not void and

> therefore passes the title (*Noble v. Union River Logging R. R.*, 147 U. S. 165, 174, 175), subject to the right of the government to attack the patent *by a direct suit* for its *annulment* if the land was known to be mineral when the patent issued."

So in the present case if the Secretary had rendered this judgment without any hearing at all and without any investigation whatever, the judgment would still be valid against the attack now made upon it. The only remedy of the government is a direct suit to set aside the judgment which is a valid, controlling judgment until so set aside.

We have thus established that the judgment of the Secretary is presumed to have been rendered on the merits, that as a matter of fact it was rendered on the merits, and that it cannot be collaterally attacked for errors, irregularities or mistakes, even if any were made.

XVI.

THIS JUDGMENT OF THE SECRETARY IS EQUIVALENT TO A PATENT. IT CANNOT BE SET ASIDE EXCEPT IN A DIRECT PROCEEDING BROUGHT FOR THAT PURPOSE.

Neither a patent nor an act equivalent to a patent can be set aside except in a direct proceeding brought for that purpose. *Burke v. Southern Pacific*, 234 U. S. 669; *Noble v. Union River Logging R. R.*, 147 U. S. 165.

A consideration of various cases decided by this court determines that various kinds of acts of the Department are equivalent to the issuance of a patent.

Such acts of the Department either operate to transfer the title of the land from the United States to the claimant or are a confirmation of a title that has already vested. Sometimes such act, which is equivalent to a patent, is a mere certification of a list to the state, sometimes the mere approval of a survey, sometimes the approval of a selection, sometimes the approval of a map, sometimes the approval of a railroad right-of-way, sometimes an act of Congress and sometimes a decision of the Department. But whatever the act taken by the Department, it is held to be the equivalent of a patent, provided there is no further action for the Department to take.

Shaw vs. Kellogg, 170 U. S. 312, page 341 of opinion;
Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, page 592 of opinion;
Chandler v. Calumet & Hecla Mining Co., 149 U. S. 79;
Noble v. Union River Logging R. R., 147 U. S. 165;
Del Pozo v. Wilson Cypress Co., 269 U. S. 82;
Morrow v. Whitney, 95 U. S. 551;
Boquillas Cattle Co. v. Curtis, 213 U. S. 339;
Landeau v. Hanes, 21 Wall. 521.

In *United States v. Schurz*, 102 U. S. 378, in speaking of the point when the title passes, this court said at page 402:

"It is equally clear that this period is at the latest, precisely *when the last act in the series*, essential to the transfer of title has been performed. Whenever this takes place, the land has ceased to be the land of the government, or to speak in

> technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away."

So, in this case, there was nothing further for the Interior Department to do. There was no provision for the issuance of a patent. Their was no provision for any approval of any list. In fact, there was no provision for the doing of any further act in connection with the title. The grant was a grant *in praesenti*. The title passed to the state, unless the land was known mineral land at the date of the approval of the survey. The United States filed a formal proceeding to have it determined that the title had not passed to the state. That proceeding came on for hearing before the tribunal having jurisdiction to hear it. The hearing was held and the judgment was rendered that the title had passed from the United States and that the state's title had vested. There was no other act that the Department could take; there was no further paper for it to sign; there was no entry to be made; there was nothing further of any kind or character to be done. The last act in the transmission of the title to the state had been performed, and under the authorities cited, the title had passed to the state.

XVII.

THE JUDGMENT HAVING DETERMINED THAT THE TITLE HAD PASSED TO THE STATE, THE LAND IS NO LONGER PART OF THE PUBLIC DOMAIN, THEREFORE THE PRESENT SECRETARY HAS NO JURISDICTION OVER IT. HIS ATTEMPT TO HOLD HEARINGS OR MAKE ORDERS WITH REFERENCE TO THIS LAND IS BEYOND HIS JURISDICTION AND MAY BE ENJOINED AS AN UNWARRANTED CLOUDING OF TITLE.

On page 26 of his brief, counsel cites a number of cases to the point that one Secretary can reverse the action of his predecessor, but in each one of these cases the order reversed was an order which had not passed or confirmed the title to the land. It is undoubtedly true that where the title has not passed from the Government, but the land is still a part of the public domain, the Secretary has jurisdiction over the land and can make orders concerning it, even to the extent of reversing some former order. But it is equally true that where the title has passed, then the Secretary has no jurisdiction over the land and cannot reverse an action of his predecessor, nor in fact can he make any order concerning the land because he has no jurisdiction over it.

When this judgment of the former Secretary was entered it was equivalent to the issuance of a patent and the land ceased to be a part of the public domain. The present Secretary, therefore, has no jurisdiction over the land. Having no jurisdiction, he cannot set aside the judgment of his predecessor, nor can he make

any other order with reference to the land, because the land, itself, is beyond his jurisdiction.

Moore v. Robbins, 96 U. S. 530;
Noble v. Union River Logging R. R., 147 U. S. 165;
United States v. Schurz, 102 U. S. 378.
Lane v. Watts, 234 U. S. 525;
United States v. Stone, 2 Wall. 525.

XVIII.

THIS SUIT IS NOT AGAINST THE UNITED STATES, BUT IS AGAINST THE SECRETARY TO PREVENT HIM FROM ACTING WHERE HE HAS NO AUTHORITY AND TO PREVENT HIM FROM CLOUDING THE TITLE TO LAND OVER WHICH HE HAS NO JURISDICTION.

On pages 75 and 76 of his brief counsel cite a number of cases to the point that this action is in reality one against the United States and, therefore, cannot be maintained. But all the cases which hold that the United States is a necessary party to an action against the Secretary concerning lands, are cases where the title to the land had not passed from the United States, and the land was still a part of the public domain. Of course, under such circumstances, the Secretary of the Interior has jurisdiction over the land and the United States owning the title is a necessary party to any suit concerning such land. But where the title has passed from the United States and the land is, therefore, no longer a part of the public domain, then the action, as in this case, is merely against the Secretary of the Interior to prevent him from acting where he has no jurisdiction and to prevent him from casting

an unwarranted cloud upon respondent's title. Such an action can be maintained and the United States is not a proper party.

Moore v. Robbins, 96 U S. 530;
United States v. Schurz, 102 U. S. 378;
Noble v. Union River Logging R. R., 147 U. S. 165;
Lane v. Watts, 234 U. S. 525.

CONCLUSION.

The judgment of the Secretary of the Interior of June 9, 1921, was a judgment on the merits, which was equivalent to a patent. This judgment cannot be held void because of supposed errors in the consideration of evidence, or in procedure. The only method of setting aside this judgment is by direct attack upon the judgment itself. Such was the method pursued by the United States in the Southern Pacific Case, upon which counsel relies, and such has been the method pursued in every successful attack upon a judgment of the Department where the Department had jurisdiction. The lower courts, in well reasoned opinions, have held that the Secretary decided the case upon the merits and that this decision of the Secretary was not open to collateral attack.

Up to the present time, the government of the United States has made no attack upon this judgment, but the present Secretary of the Interior takes it upon himself to attempt to set aside a valid judgment of his predecessor, and to again hear and to again decide the very case which his predecessor has already heard and has already decided. This cannot be done. As this Court said, as far back as the case of *United States v. Stone*, 2 Wall. 525:

> "One officer of the land office is not competent to cancel or amend the act of his predecessor. That is a judicial act and requires the judgment of a court."

If the proper law officers of the Government are dissatisfied with this judgment, they can bring a suit in a court of equity to set it aside, but until such action is taken and until the judgment is so set aside, it remains a valid judgment, controlling in this and in all other cases where its effect is material.

We respectfully submit that the judgment of the lower court should be affirmed.

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